Supreme Court, U. S.
FILED
JUN 15 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

No. 75-1812

R. F. SHAFFER, et al.,

Appellants,

v.

ARNOLD HEITNER, as Custodian for MARK ANDREW HEITNER,

Appellee.

JURISDICTIONAL STATEMENT.

On Appeal From the Supreme Court of the State of Delaware.

RICHARDS, LAYTON & FINGER,
4072 DuPont Building,
Wilmington, Delaware. 19801

EDMUND N. CARPENTER, II,
R. FRANKLIN BALOTTI,

McCUTCHEN, DOYLE, BROWN & ENERSEN,
601 California Street,
San Francisco, California. 94108

WILLIAM W. SCHWARZER,
JOHN R. REESE,

Attorneys for Appellants.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	3
How the Federal Question Is Presented	4
THE QUESTIONS ARE SUBSTANTIAL	5
CONCLUSION	22
APPENDIX A	A1
APPENDIX B	A24
APPENDIX C	A45

TABLE OF CITATIONS.

Cases: Page

Astol Calero-Toledo v. Pearson Yacht Leasing Co., 416 U. S. 663 (1974) 8, 10
Boddie v. Connecticut, 401 U. S. 371 (1971) 6
Breech v. Hughes Tool Co., 41 Del. Ch. 128, 189 A. 2d 428 (Sup. Ct. 1963) 17
Carey v. Sugar, et al., — U. S. —, 44 L. W. 4416 (Mar. 25, 1976) 11, 18
Dry Clime Lamp Corp. v. Edwards, 389 F. 2d 590 (5th Cir. 1968) 16
Farrell v. Piedmont Aviation, Inc., 411 F. 2d 812 (2nd Cir. 1969) 16
Fashion Two Twenty, Inc. v. Steinberg, 339 F. Supp. 836 (E. D. N. Y. 1971) 14
Fuentes v. Shevin, 407 U. S. 67 (1972) 5, 9, 12, 16, 18, 21, 22
Hanson v. Denckla, 357 U. S. 235 (1958) 11, 13
Garcia v. Krausse, 380 F. Supp. 1254 (S. D. Tex. 1974) 11
Huffman v. Pursue, Ltd., 420 U. S. 592, 95 S. Ct. 1200 (1975) 2
Hutchison v. Bank of No. Carolina, 392 F. Supp. 888 (M. D. N. C. 1975) 11
International Shoe Co. v. Washington, 326 U. S. 310 (1945) 5, 6, 11, 12, 13, 20
Jellenik v. Huron Copper Min. Co., 177 U. S. 1 (1900) 15
Jonnet v. Dollar Sav. Bank, 530 F. 2d 1123 (3rd Cir., 1976) 7, 8, 11, 15
Minichiello v. Rosenberg, 410 F. 2d 106 (2nd Cir. 1968), cert. denied, 396 U. S. 844 (1969) 16
Mitchell v. W. T. Grant Co., 416 U. S. 600 (1974) 8, 12, 18
Mullane v. Central Hanover Tr. Co., 339 U. S. 306 (1950) .. 6, 11
North Georgia Finishing Inc. v. Di-Chem, Inc., 419 U. S. 601 (1975) 5, 8, 12, 16, 20, 21
Ownbey v. Morgan, 256 U. S. 94 (1921) 6, 7, 8, 9, 11
Podolsky v. Devinney, 281 F. Supp. 488 (S. D. N. Y. 1968) .. 16
Rogers v. Guaranty Trust Co., 288 U. S. 123 (1932) 15

TABLE OF CITATIONS (Continued).

Cases (Continued): Page

Sands v. Lefcourt Realty Corp., 35 Del. Ch. 340, 117 A. 2d 365 (Sup. Ct. 1955) 5
Simpson v. Loehmann, 21 N. Y. 2d 305, 287 N. Y. S. 2d 633, 234 N. E. 2d 669 (1967), rearg. denied, 21 N. Y. 2d 990, 290 N. Y. S. 2d 914, 238 N. E. 2d 319 (1968) 16
Sniadach v. Family Finance Corp., 395 U. S. 337 (1969) .5, 8, 12, 16
Tenney v. Jacobs, 43 Del. Ch. 526, 240 A. 2d 138 (Sup. Ct. 1968) 5, 21
Terral v. Burke Const. Co., 257 U. S. 529 (1922) 15
Trans World Airlines, Inc. v. Hughes, 40 Del. Ch. 523, 185 A. 2d 762 (Ch. 1962), aff'd sub nom. Breech v. Hughes Tool Co., supra 17
Trans World Airlines, Inc. v. Hughes Tool Co., 41 Del. Ch. 11, 187 A. 2d 350 (Ch. 1962) 5
Wagman v. Astle, 380 F. Supp. 497 (S. D. N. Y. 1974) 14
Weller v. Cromwell Oil Company, 504 F. 2d 927 (6th Cir. 1974) 14
Western Union Co. v. Pennsylvania, 368 U. S. 71 (1961) ... 15
Wilshire Oil Company of Texas v. Riffe, 409 F. 2d 1277 (10th Cir. 1969) 14
Winters v. New York, 333 U. S. 507 (1948) 2

Miscellaneous:

Comment, 19 Mich. L. Rev. 583 (1921) 8
Fourteenth Amendment Constitution of the United States ...2, 4, 5
Currie, Attachment and Garnishment in the Federal Courts, 59 Mich. L. Rev. 337 (1961) 7
Delaware Securities Statute:
6 Del. C. §§ 8-102, 8-105, 8-301 14
Delaware Sequestration Statutes:
8 Del. C. § 169 14
10 Del. C. § 366 ..... 2, 3
Folk and Moyer, Sequestration in Delaware: A Constitutional Analysis, 73 Col. L. Rev. 749 (1973) 6, 11, 16
Quasi in Rem Jurisdiction and Due Process Requirements, 82 Yale L. J. 1023 (1973) 8
United States Code, Section 1257(2) of Title 28 2

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the Supreme Court of the State of Delaware, dated April 15, 1976, affirming a decision by the Delaware Court of Chancery which upheld an order sequestering certain property of defendants without notice or hearing. Appellants [1] submit this jurisdictional statement to show that this Court has jurisdiction and that substantial questions are presented.

OPINIONS BELOW.

The opinion of the Supreme Court of the State of Delaware is not yet officially reported. A copy is appended to this statement as Appendix A. A copy of the opinion of the Court of Chancery of the State of Delaware in this case is attached as Appendix B.

JURISDICTION.

This is a shareholder's derivative action in which plaintiff-appellee sought to obtain personal jurisdiction over non-resident defendants-appellants by sequestering, i.e., purportedly seizing by notations on the books of the issuing corporation, capital stock owned by defendants. The Court of Chancery denied defendants' motion to quash the writ of sequestration and to dismiss. The Supreme Court of Delaware affirmed in a decision rendered April 15, 1976. The notice of appeal to this Court was filed May 7, 1976, in the Supreme Court of the State of Delaware.

1. The appellants are R. F. Shaffer, J. L. Kerrigan, F. L. Nageotte, Gerald H. Trautman, Bart Cook, R. N. Dick, William E. Hastings, Howard Boyd, H. A. Montague, Rankin M. Smith, Hans Stauffer, Harold C. Stuart, James W. Walker, Leslie B. Worthington, Jess Nicks, Ralph C. Batastini, Robert Minge Brown, David L. Duensing, Charles R. Orem, Clifton B. Cox and M. J. O'Rourke.

Jurisdiction of this Court is founded on Section 1257(2) of Title 28, United States Code, on the ground that the decision below upheld the validity of a state statute against a claim that it is repugnant to the Fourteenth Amendment of the Constitution of the United States. See *Winters v. New York*, 333 U. S. 507, 509 (1948); *Huffman v. Pursue, Ltd.*, 420 U. S. 592, 95 S. Ct. 1200 (1975).

STATUTE INVOLVED.

The statute involved is the Delaware Sequestration Statute, 10 Del. C. § 366. It is set out in full text in Appendix C.

QUESTION PRESENTED.

Does the Fourteenth Amendment permit Delaware to coerce non-resident individual defendants to submit to personal jurisdiction of the Delaware courts, although they have no contacts with Delaware, by sequestering, without notice or hearing and without taking physical possession, capital stock owned by them in a Delaware corporation and denying them the right to defend that property unless they enter a general appearance, which would subject them to possible liability in amounts exceeding the value of the sequestered property?

STATEMENT OF THE CASE.

This is a derivative action brought by a shareholder of The Greyhound Corporation ("Greyhound") against some twenty-eight present or former officers, directors or employees of Greyhound or its subsidiary Greyhound Lines, Inc. who served at various times between 1957 and 1974. The complaint charges that Greyhound suffered losses as a result of conduct of defendants which allegedly caused Greyhound to have been found to have violated the antitrust laws as well as an order of a United States District Court.

All of the individual defendants are non-residents of the State of Delaware, as is the plaintiff. No attempt was made to serve any of them with summons or other process founded on in personam jurisdiction, or to demonstrate that any of them has contacts with Delaware sufficient to sustain personal jurisdiction.

Instead plaintiff sought to subject defendants to Delaware's jurisdiction by invoking the procedure under Delaware's Sequestration Statute, 10 Del. C. § 366, and sequestering Greyhound capital stock owned by the defendants.

On May 22, 1974, upon the filing of his complaint, plaintiff applied for and the Delaware Court of Chancery issued, without notice or hearing, an order,

(1) directing the individual defendants to appear and answer the complaint;

(2) seizing "property of the [individual] defendants in the State of Delaware;" and

(3) directing Greyhound to report on the securities held by defendants, to cause entries to be made in its books showing that the securities had been

sequestered, not to transfer those securities or permit them to be transferred, except as permitted by the order, and to do all that is necessary to hold these securities until further order.

Under the Delaware procedure, as interpreted and applied by its courts, the defendants have no remedy against the seizure, or any subsequent disposition, of their property (other than for technical non-compliance with the statute) nor do they have a right to defend against plaintiff's claims on the merits unless they "voluntarily" make a general appearance and submit to the in personam jurisdiction of the Delaware court.

How the Federal Question Is Presented.

On July 30, 1974, the individual defendants filed a notice and motion to quash service of process, to vacate the order of sequestration and to dismiss the action as to them. Their motion was based primarily on the ground that the Delaware sequestration procedure violates the due process clause of the Fourteenth Amendment of the United States Constitution.[2] A motion to modify the sequestration order was also filed by Greyhound.

On May 12, 1975, the Court of Chancery filed its opinion denying the defendants' motions and upholding the validity of the Delaware statute. Defendants appealed to the Delaware Supreme Court and, after briefing and oral argument, that court on April 15, 1976, filed its decision substantially affirming the decision of the lower court. This appeal followed.

---

2. Subsequent to the filing of the motion, plaintiff was granted leave to file an amended complaint and an alias writ of sequestration was issued. It was stipulated that defendants' motion would be deemed to run against these pleadings.

THE QUESTIONS ARE SUBSTANTIAL.

This case presents questions of substantial importance under the due process clause of the Fourteenth Amendment. The basic question is whether Delaware may seize the property of non-resident defendants without notice or hearing and then deny them the right to defend that property unless they waive their due process rights under *International Shoe Co. v. Washington*, 326 U. S. 310 (1945), and submit to personal jurisdiction of the Delaware courts where none would otherwise exist.

I.

On the face of it, the Delaware procedure is in plain conflict with the principles laid down by this Court in *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969); *Fuentes v. Shevin*, 407 U. S. 67 (1972) and *North Georgia Finishing Inc. v. Di-Chem, Inc.*, 419 U. S. 601 (1975); among others. Those cases establish that the Fourteenth Amendment bars the seizure of property without notice and hearing or other safeguards.

The constitutional defect of the Delaware procedure is compounded by the fact that it is applied so as to coerce non-residents not otherwise subject to the jurisdiction of Delaware to submit to that jurisdiction—indeed, that is the purpose of the statute. See, App. A, A13, and *Tenney v. Jacobs*, 43 Del. Ch. 526, 240 A. 2d 138, 139 (Sup. Ct. 1968). Unless a defendant whose property has been sequestered makes a general appearance, he cannot defend his right to that property and it may eventually be sold and the proceeds applied to satisfy plaintiff's claim regardless of its merits, without any hearing whatsoever. *Sands v. Lefcourt Realty Corp.*, 35 Del. Ch. 340, 117 A. 2d 365 (Sup. Ct. 1955); *Trans World Airlines, Inc. v. Hughes Tool Co.*, 41 Del Ch. 11, 187 A. 2d 350 (Ch. 1962).

Thus, forfeiture is the price a defendant must pay to stand on his due process rights under *International Shoe*. Conversely, Delaware's conditioning the defendant's right to a hearing on his submission to in personam jurisdiction against which the Constitution would otherwise protect denies him "a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U. S. 371, 379 (1971).

> "This right to be heard has little reality or worth unless one is informed that the matter is pending and *can chose for himself whether to appear or default, acquiesce or contest.*" *Mullane v. Central Hanover Tr. Co.*, 339 U. S. 306, 314 (1950).[3]

A defendant's coerced appearance, under threat of forfeiture of his property, hardly reflects an exercise of free choice whether or not to appear. See, Folk and Moyer *Sequestration in Delaware: A Constitutional Analysis*, 73 Col. L. Rev. 749 (1973).

The Delaware Supreme Court, while acknowledging that "[s]uch a proceeding has the seeds if not the fruits of unfairness in permitting the impounding of property before judgment and, under some circumstances, upon thin assertions of right" (App. A, A3-A4) nonetheless upheld its constitutional validity, essentially on the authority of a decision rendered by this Court fifty-five years ago in *Ownbey v. Morgan*, 256 U. S. 94 (1921). That case in effect assumed the validity of Delaware's foreign attachment statute which provided for substantially the same procedure at law as the sequestration statute provides in equity. This Court there held that requiring a non-resident defendant to post special bail before permitting him to make a general appearance and secure release of the

3. All emphasis herein is added unless otherwise stated.

attachment did not offend due process. Mr. Justice Pitney, speaking for the Court, found this procedure to have been derived from settled usage in England and the Colonies and not in conflict with any specific provision of the Constitution, and said:

> "A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the States as suited to their circumstances and needs, *cannot be deemed inconsistent with due process of law*, even if it be taken with its ancient incident of requiring security from a defendant who after seizure of his property comes within the jurisdiction and seeks to interpose a defense. The condition imposed has a reasonable relation to the conversion of the proceeding *quasi in rem* into an action *in personam;* ordinarily it is not difficult to comply with—a man who has property usually has friends and credit—and hence in its normal operation it must be regarded as a permissible condition. . ." (256 U. S. at 111)

Ownbey v. Morgan is plainly a relic from another age.[4] As the Court of Appeals for the Third Circuit recently put

4. Judge Gibbons, concurring in *Jonnet v. Dollar Sav. Bank*, 530 F. 2d 1123 (3rd Cir., 1976) at page 1136, said that "[i]t is inconceivable that *Ownbey* would be decided today as it was decided in 1921." One commentator has described it as "one of the more egregious injustices of modern times." Currie, *Attachment and Garnishment in the Federal Courts*, 59 Mich. L. Rev. 337, 379 (1961). Even contemporary comment on *Ownbey v. Morgan* suggested that the rule on which it was based had no place in modern jurisprudence:

> "It appeared that this harsh rule was derived from the Custom of London in foreign attachment, and had been brought over to America by the colonists, and that in Delaware it could show statutory continuity down to the present time. The court cites a number of cases from

it, "°°°*Fuentes, Mitchell* and *Di-Chem* cast serious doubt on *Ownbey's* current strength." *Jonnet v. Dollar Sav. Bank,* 530 F. 2d 1123, 1128 (3rd Cir., 1976). Nevertheless, references to *Ownbey* appear in the opinions of this Court in both *Fuentes* and *Sniadach* and in Mr. Justice Powell's concurring opinion in *North Georgia Finishing.* (407 U. S. at 97; 395 U. S. at 339; 419 U. S. at 610). Additional references in the same context are found in *Astol Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U. S. 663, 679 (1974) and in *Mitchell v. W. T. Grant Co.,* 416 U. S. 600, 613 (1974), both of which involved the validity of certain prehearing seizure procedures.

After reviewing this Court's references to *Ownbey* in those cases, the Delaware Supreme Court concluded that it continued to be viable authority for the validity of attachments without notice and hearing necessary to secure jurisdiction of a state court (App. A, A9-A11). In doing so, it relied heavily on this Court's citations of *Ownbey* in connection with the exception for so-called extraordinary situations (see p. 6, above), particularly the following footnote in *Fuentes:*

> "Of course, outright seizure of property is not the only kind of deprivation that must be pre-

4. (Cont'd.)

> other seaboard states where the Custom of London also obtained a foothold, but an investigation of the statutory history of the rule in those states seems to indicate that in every one of them the rule long since succumbed to the progress of enlightened civilization and passed over the Styx into the shadowy land of legal tradition where the ghosts of ancient laws wander restlessly forever." Comment, 19 *Mich. L. Rev.* 583, 854 (1921).

And as this Court put it in *Sniadach:*

> "The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms." (395 U. S. at 340). See also, Note, *Quasi in Rem Jurisdiction and Due Process Requirements,* 82 Yale L. J. 1023 (1973).

> ceded by a prior hearing. See, e.g., *Sniadach v. Family Finance Corp., supra.* In three cases, the Court has allowed the attachment of property without a prior hearing. In one, the attachment was necessary to protect the public against the same sort of immediate harm involved in the seizure cases—a bank failure. *Coffin Bros. & Co. v. Bennett,* 277 U. S. 29. Another case involved attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest. *Ownbey v. Morgan,* 256 U. S. 94. It is much less clear what interests were involved in the third case, decided with an unexplicated *per curiam* opinion simply citing *Coffin Bros.* and *Ownbey. McKay v. McInnes,* 279 U. S. 820. As far as essential procedural due process doctrine goes, *McKay* cannot stand for any more than was established in the *Coffin Bros.* and *Ownbey* cases on which it relied completely. See *Sniadach v. Family Finance Corp., supra,* at 340; *id.* at 344 (Harlan, J. concurring)." 407 U. S. at 91; see also 416 U. S. at 679)

But this Court's reasoning in the opinion in *Fuentes* and its progeny is wholly inconsistent with the interpretation Delaware has given to this footnote and the related citations of *Ownbey.* In the *Fuentes* opinion this Court explicitly stated:

> "There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. *Boddie v. Connecticut,* 401 U. S. at 379. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for

a prior hearing. ° ° ° Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food.

"The Florida and Pennsylvania prejudgment replevin statutes serve no such important governmental or general public interest. They allow summary seizure of a person's possessions when no more than private gain is directly at stake. ° ° °

". . . state intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health." (407 U. S. at 90-93). See also, *Astol Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U. S. at 679.

The Delaware sequestration procedure is not limited to extraordinary situations. By its terms it is available to *any* private plaintiff who files an action in Delaware on *any* claim against *any* non-resident defendant, so long as that defendant happens to own securities issued by any Delaware corporation or other property which the Delaware court considers subject to seizure.[5] Thus what the Delaware court has chosen to clothe in the protective mantle of the "extraordinary situation" is nothing but the routine acquisition in a private dispute of in personam

5. In view of the large number of corporations incorporated in Delaware, and the fact that their securities are widely held by the public, there are potentially hundreds of thousands, if not millions of persons who are subject to Delaware's sequestration process (a process which is not restricted to officers or directors but runs against any non-resident shareholder).

jurisdiction over non-resident defendants—an ordinary procedural step which occurs daily in countless law suits.

We accept for purposes of the argument that a state may have a "basic and important public interest" in enabling its residents to have a remedy against non-resident defendants. Long-arm statutes by which such defendants may be subjected to in personam jurisdiction serve that purpose eminently—whatever may have been the need for other procedures such as sequestration in the past, it is anything but compelling now that long-arm statutes are available. But the exercise of jurisdiction under long-arm statutes is of course subject to the due process requirements enunciated in *International Shoe*. Delaware apparently tries to evade these due process requirements by using sequestration rather than long-arm service, but there is no reason why it should be permitted to do so.[6] See, Folk and Moyer, 73 Col. L. Rev. at 765-768.

We submit that the time is ripe for this Court to lay the ghost of *Ownbey* to rest and end the wide-spread confusion and uncertainty which pervades this important branch of the law. See, *Jonnet v. Dollar Sav. Bank*, above; *Carey v. Sugar, et al.*, – U. S. –, 44 L. W. 4416 (Mar. 25, 1976); *Hutchison v. Bank of No. Carolina*, 392 F. Supp. 888 (M. D. N. C. 1975); *Garcia v. Krausse*, 380 F. Supp. 1254 (S. D. Tex. 1974).

II.

The instant case, aside from focusing on the compelling need to clarify the status of *Ownbey*, raises the im-

6. Indeed it is doubtful that the Constitution permits Delaware to exercise even jurisdiction over a non-resident's property alone in the absence of contacts sufficient to satisfy the *International Shoe* test with respect to its owner. See, *Jonnet v. Dollar Sav. Bank*, above, 530 F. 2d 1123, 1130-1143 (Gibbons J., concurring); *Hanson v. Denckla*, 357 U. S. 235, 251, 253 (1958); *Mullane v. Central Hanover Bank and Trust Co.*, 339 U. S. 306, 312-313 (1950).

portant question whether sequestration procedures such as Delaware's can in any case be squared with the principles and rules laid down by this Court in the *Sniadach, Fuentes* and *Di-Chem* line of cases.

To begin with, the court below considered all of those cases distinguishable because they "involved prejudgment seizures . . . for the purpose of collecting moneys claimed to be owed. . . . All of those cases involve claims by creditors against resident debtors, none sought attachment to establish state jurisdiction. . . ." (App. A, p. 15). But as *Mitchell* makes clear, the claim to the attachment remedy by a creditor who, by reason of having sold the defendant the goods subject to seizure, retains some interest in those goods, is stronger than that of someone like the plaintiff here who, lacking any interest in or claim to property of defendant, simply seizes it to acquire jurisdiction. See 416 U. S. at 604. See, also, 407 U. S. at 84.[7] Accordingly, if this Court's prior decisions are distinguishable, they are distinguishable only in the sense that they presented a *less* compelling case for protection under the due process clause than this case.

Moreover, the purpose of the seizure cannot immunize it from scrutiny under the due process clause. On the contrary (as pointed out above), attempts to acquire jurisdiction over non-residents bring into play the additional due process limitations mandated by *International Shoe*, namely, that any assertion of jurisdiction must satisfy traditional notions of fair play and substantial justice. In this case, none of the individual defendants resides in Delaware and none has, or has been shown to have, any contacts with Delaware satisfying the *International Shoe* test. Accordingly, none would be subject to personal jurisdiction even had he been properly served under a long-arm statute.

7. *Fuentes*, for example, involved the seizure of goods sold by plaintiff to defendant under a conditional sales contract (407 U. S. at 86). In *Mitchell*, plaintiff had a vendor's lien on the seized goods to secure payment of the purchase price (416 U. S. at 604).

The court below sought to brush *International Shoe* aside as inapplicable on the stated ground that

> "jurisdiction under § 366 remains . . . *quasi in rem* founded on the presence of capital stock here, not on prior contact by defendant with this forum." (App. A, p. 7)

But the important questions raised by this case cannot be disposed of by resort to labels. The undisputed fact is that Delaware resorts to sequestration for the purpose of acquiring personal jurisdiction over defendants. This Court has made it clear that where it is fundamentally the assertion of in personam jurisdiction which is at stake, *International Shoe* controls:

> "However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him. See *International Shoe Co. v. Washington*, 326 U. S. 310, 319. * * * . . . it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. *International Shoe Co. v. Washington*, 326 U. S. 310, 319." *Hanson v. Denckla*, 357 U. S. 235, 251, 253 (1958). See, Folk and Moyer, 73 Col. L. Rev. at 784-789.[8]

8. In the Delaware Supreme Court plaintiff made the alternative argument that defendants had sufficient contact with Delaware to satisfy the requirements of due process. This argument was, of course, irrelevant, since no attempt has been made to acquire in personam jurisdiction over these defendants. There has been no

The Delaware court's reasoning, which implies that jurisdiction may be coerced where it may not be acquired by conventional process, cannot withstand constitutional analysis for at least two additional reasons: first, because there is here in fact no property within the jurisdiction on which in rem jurisdiction could be founded, and, second, even if there were, the Delaware court, by seizing property and disposing of it without a hearing unless defendant makes a general appearance, does not exercise legitimate quasi in rem jurisdiction.

First, Delaware's purported seizure of the capital stock owned by defendants is premised on the fictional situs which Delaware law assigns stock issued by Delaware corporations (8 Del. C. § 169).[9] In fact, none of the certificates held by any of the defendants was seized. Those certificates, remaining in the hands of their owners, are negotiable instruments under Delaware law (6 Del. C. §§ 8-102, 8-105, 8-301); a good faith purchaser who ac-

8. (Cont'd.)
service of a summons on them, and Delaware has no long-arm statute. Plaintiff's contention there that the individual defendants might have been made subject to in personam jurisdiction in Delaware simply by reason of being directors or officers of employees of The Greyhound Corporation—even if there were a long-arm statute, and even if such service had been attempted—would still be without merit. See *Weller v. Cromwell Oil Company*, 504 F. 2d 927 (6th Cir. 1974); *Wilshire Oil Company of Texas v. Riffe*, 409 F. 2d 1277, 1281 (10th Cir. 1969); *Wagman v. Astle*, 380 F. Supp. 497, 499 (S. D. N. Y. 1974); *Fashion Two Twenty, Inc. v. Steinberg*, 339 F. Supp. 836, 841 (E. D. N. Y. 1971).

9. Examination of the Commercial Codes of the various states discloses that fifty-one jurisdictions have adopted Section 8-317 of the Uniform Commercial Code which provides that no attachment of shares of stock shall be valid "until the security is actually seized by the officer making the attachment." Delaware alone has modified that section by an amendment under which "the situs of the ownership of the capital stock of all corporations existing under the laws of this State . . . shall be regarded as in this State." 8 Del. C. § 169.

quires the certificate would acquire good title to the shares it represents; and, of course, the state in which the certificate is located can seize it by attachment or other appropriate process, regardless of Delaware's sequestration. Accordingly, the purported seizure of defendant's stock is wholly inconsistent with accepted notions of quasi in rem jurisdiction and the applicable due process principles (See the excellent discussion on this point by Judge Gibbons concurring in *Jonnet v. Dollar Sav. Bank*, p. 1139).[10]

Second, even if one assumed the existence of quasi in rem jurisdiction over the stock owned by defendant, Delaware's procedure could not be justified as an exercise of such jurisdiction. It bars any hearing on the rights of the parties to the property and precludes the defendant altogether from appearing to litigate and defend the quasi in rem proceeding. To put it differently, Delaware's procedure offers only a choice between unilateral summary seizure or in personam litigation not limited to the seized property based on the defendant's coerced general appearance.

The existence of quasi in rem jurisdiction does not sanction a procedure which conditions the owner's right to defend his property on his consent to the conversion of quasi in rem to in personam jurisdiction. Cf. *Terral v. Burke Const. Co.*, 257 U. S. 529 (1922). If Delaware were to exercise legitimate quasi in rem jurisdiction, it would necessarily afford the owner of the property an

10. The purported exercise of quasi in rem jurisdiction on the basis of the fictional situs of stock, where the certificates are physically located outside of the state, has never been approved by this Court under the due process clause. *Rogers v. Guaranty Trust Co.*, 288 U. S. 123 (1932) and *Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1 (1900), cited by the court below (App. A, pp. 23-24) did not involve or deal with that issue. That its validity is at least subject to substantial doubt is well demonstrated by Judge Gibbons' opinion in *Jonnet v. Dollar Sav. Bank*, pp. 1132-1139. And see, *Western Union Co. v. Pennsylvania*, 368 U. S. 71, 75 (1961).

unconditional opportunity to be heard and would limit any judgment in the proceeding to the property involved.[11] That of course is not what it does—on the contrary, it permits the summary seizure of property under conditions which make the owner's deprivation of his property rights far more grievous than those in *Sniadach, Fuentes* and *North Georgia Finishing*. See, Folk and Moyer, 73 Col. L. Rev. at 789-795.

III.

Even if it could be said that the application of the Delaware sequestration procedure were limited to so-called "extraordinary situations", permitting seizure without a prior hearing, and even if its coercive features, which themselves offend due process, were ignored, the procedure would still have to provide sufficient safeguards to meet the requirements of the due process clause. See, *North Georgia Finishing Inc. v. Di-Chem, Inc.*, 419 U. S. at 606; *Fuentes v. Shevin*, 407 U. S. at 67.

The court below acknowledged the requirement for adequate safeguards and enumerated those it thought to exist under the Delaware procedure (App. A, pp. 15-20). Upon analysis, however, the provisions enumerated by the court are revealed as providing no safeguards at all.

---

11. Federal courts have long recognized this distinction between quasi in rem and in personam jurisdiction and have accordingly generally limited the power of a court to enter judgment in a quasi in rem proceeding to the value or the amount of the seized property. See, *Minichiello v. Rosenberg*, 410 F. 2d 106, 111 (2nd Cir. 1968), *cert. denied*, 396 U. S. 844 (1969); *Farrell v. Piedmont Aviation, Inc.*, 411 F. 2d 812 (2nd Cir. 1969); *Podolsky v. Devinney*, 281 F. Supp. 488 (S. D. N. Y. 1968); *Dry Clime Lamp Corp. v. Edwards*, 389 F. 2d 590, 595-598 (5th Cir. 1968); see, also, *Simpson v. Leohmann*, 21 N. Y. 2d 305, 287 N. Y. S. 2d 633, 234 N. E. 2d 669, 671 (1967), *rearg. denied*, 21 N. Y. 2d 990, 290 N. Y. S. 2d 914, 238 N. E. 2d 319, 320 (1968).

(1) The court states that a court order is required for sequestration, but Delaware law gives the court no discretion to deny an application for a writ; a litigant is entitled to it as a matter of right. The trial court in its opinion denying appellants' motions stated in this respect:

> "The sequestration statute contains no provision for a review by this Court as to the necessity for its use. By case precedent it is established that a plaintiff is entitled to sequestration as a matter of right as long as his application meets procedural formalities. If the application is formally sound, this Court has no discretion to deny this right. *Breech v. Hughes Tool Co.*, Del. Supr., 189 A. 2d 428 (1963). Nor does the Court have the power to first consider the merits of the claim as a condition to authorizing sequestration. *Trans World Airlines, Inc. v. Hughes*, Del. Ch., 185 A. 2d 762 (1962), *aff'd sub nom., Breech v. Hughes Tool Co., supra.*" (App. B, A34).

In the cited decision of *Trans World Airlines, Inc. v. Hughes*, 40 Del. Ch. 523, 528, 185 A. 2d 762, 765 (Ch. 1962), *aff'd sub nom., Breech v. Hughes Tool Co.*, 41 Del. Ch. 128, 189 A. 2d 428, 431-432 (Sup. Ct. 1963), Vice Chancellor Marvel held:

> "Upon application for an order of sequestration Hughes Tool Company was required by court rule to establish that the non-resident Mr. Breech not only owned property in Delaware but that the other requirements of the application statute and rule had been met. This having been done, *an order of sequestration issued as a matter of course. It will not be quashed merely because*

> *the charges made* against Mr. Breech *may be insubstantial.*" (40 Del. Ch. at 528, 185 A. 2d at 765).

And the Delaware Supreme Court said, affirming that decision:

> "It has never been suggested, so far as we know, that the use of this process by a litigant is controllable by the court's discretion. We think that *he is entitled to it as a matter of right, just as he is entitled to a writ of summons.*" (41 Del. Ch. at 134, 189 A. 2d at 432).

In view of these statements of the law, to imply, as the opinion below does, that the signature of a judge, rather than a clerk, on the order gives rise to the kind of "control of the process" which this Court found to satisfy due process in *Mitchell* is ludicrous. *Cf. Mitchell v. W. T. Grant Co.*, 416 U. S. at 625 (Mr. Justice Powell concurring); *Carey v. Sugar, et al.*, 44 L. W. at 4417. Quite the contrary, Delaware's procedure is more accurately described by the Court's words in *Fuentes:*

> "The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure." (407 U. S. at 93, see also 91).

(2) The court states that the property to be seized must be identified with reasonable certainty. It is difficult to see how this would protect a defendant's due process

rights, but in any event the instant order of sequestration states, in this respect, that the sequestrator is to seize

> "property of the defendants in the State of Delaware, consisting of common stock, 3% Second Cumulative Preference [sic] Stock, stock unit credits, of the Greyhound Corporation and all options and all warrants to purchase the common or preferred stock of said corporation issued to the defendants and all contractual obligations, rights, debts or credits due or accrued to or for the benefit of any of said defendants under any type of written instrument, contract or other legal instrument of any kind whatever between any of the defendants and said corporation . . ." (Doc. 5 in Court of Chancery record)

This recital does not identify property to be seized—it is a dragnet clause, pure and simple.

(3) The court states that "the value of the property seized must be reasonably related to the amount of the claim asserted." However, there is no such requirement in the statute; [12] the court has no discretion to deny a writ on this ground (as established by the cases cited at p. 17 above); there is no procedure available under the statute by which a defendant could even raise the issue without having first made a general appearance; and nothing in the record reflects compliance with any such requirement.

12. The opinion in the *Hughes* case, cited by the court as its authority for the statement, does not support it at all as shown when the sentence from which the court quotes is read in its entirety:

> "Furthermore, *there is no limitation contained in Title 10 Del. C. § 366 as to the seizure of a non-resident's property* in Delaware, although, of course, the property so caused to be seized *should* always bear some reasonable relationship to the amount of the claim asserted." (185 A. 2d at 765)

(4) The court states that notice must be promptly given to a defendant after seizure, but since he has no right to a hearing on the merits of the seizure, such notice does little to protect his rights.

(5) The court states that defendant may appear to attack compliance with § 366, but this gives him the right only to raise issues concerning compliance with the technical requirements of the statute, and its constitutional validity. "There is no provision for an early hearing at which the . . . [plaintiff] would be required to demonstrate at least probable cause for the garnishment" (*North Georgia Finishing Inc. v. Di-Chem, Inc.*, 419 U. S. at 607), let alone for a hearing at which defendant can litigate the merits of plaintiff's claim without waiving his rights under *International Shoe*.[13] Without such provision, the statute plainly cannot withstand scrutiny under the Fourteenth Amendment.

(6) The court states that defendant may petition for release of the property and suggests that the court, in considering such a petition, may conduct a preliminary inquiry into the merits of the claim to determine whether the property should be released. But defendant can file such a petition only if and after he has submitted to personal jurisdiction; by then, the damage has been done—the seizure has been accomplished and the defendant has been coerced into making a general appearance in order to gain access to the court to make such a petition. The right to

13. In *North Georgia Finishing Inc.*, the Court struck down Georgia's garnishment statute because it barred challenge of the garnishment without the prior filing by the debtor of a bond. Delaware's sequestration statute presents the a fortiori case because it bars a challenge without the prior general appearance by the defendant, obviously a more risky and costly step than merely filing a bond.

file such a petition so conditioned obviously does not cure the constitutional defect of the statute.[14]

(7) The court states that after the defendant has made a general appearance, no new causes of action may be added to the complaint. But again, this limitation does not diminish the concededly coercive operation of the procedure which offends due process. See, *Tenney v. Jacobs*, 43 Del. Ch. 526, 528-529, 240 A. 2d 138, 139 (Sup. Ct. 1968).

(8) The court states that while the property is seized, the owner may sell it or otherwise deal with it so long as all proceeds are deposited with the sequestrator, but this provision does not lessen the deprivation and coercion inherent in the procedure—surely seizure does not become acceptable by giving the defendant the right to substitute other property.

IV.

Finally, the court below stated that Delaware's procedure "promotes judicial economy by concentrating the settlement of claims in one jurisdiction or action." (App. A, p. 22). But this Court has consistently refused to allow Constitutional rights to be sacrificed at the altar of efficiency and economy:

> "Procedural due process is not intended to promote efficiency or accomodate all possible interests; it is intended to protect the particular interests of the person whose possessions are about to be taken.

14. It is clear, moreover, that the availability of a quick release provision would not in any event cure a prior unconstitutional deprivation of property rights. See, *Fuentes v. Shevin*, 407 U. S. at 84-86; *North Georgia Finishing Inc. v. Di-Chem, Inc.*, 419 U. S. at 601.

'The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.' *Stanley v. Illinois,* 405 U. S. 645, 656." *Fuentes v. Shevin,* 407 U. S. at 90-91, n. 22.

CONCLUSION.

For the reasons stated, probable jurisdiction should be noted.

Respectfully submitted,

EDMUND N. CARPENTER, II,
R. FRANKLIN BALOTTI,
RICHARDS, LAYTON & FINGER,

WILLIAM W. SCHWARZER,
JOHN R. REESE,
McCUTCHEN, DOYLE, BROWN & ENERSEN,
Attorneys for Appellants.

Dated: June 15, 1976.

APPENDIX A.

OPINION.

132, 1975.

THE GREYHOUND CORPORATION, ET AL.,
Defendants Below, Appellants,

v.

ARNOLD HEITNER, AS CUSTODIAN FOR MARK ANDREW HEITNER,
Plaintiff Below, Appellee.

Argued: October 15, 1975

Decided: April 15, 1976

Before DUFFY and McNEILLY, *Justices,* and TAYLOR, *Judge.*

Upon appeal from the Court of Chancery. Affirmed in part.

Richard F. Corroon and Richard E. Poole, of Potter Anderson & Corroon, Wilmington, for defendant-appellant The Greyhound Corporation.

Max Terry, Jr., of Terry, Terry & Jackson, Dover, and William W. Schwarzer and Lynn H. Pasahow, of McCutchen, Doyle, Brown & Enersen, San Francisco, for individual defendants-appellants.

Joshua M. Twilley, of Twilley, Jones & Feliceangeli, Dover, and Michael F. Maschio and Carol Faye Simkin, of Cowan, Liebowitz & Latman, P. C., New York City, for plaintiff-appellee.

DUFFY, *Justice.*

The single question at issue in this appeal is the constitutionality of the Delaware Sequestration Statute and the related procedures thereunder. In our view, they do not violate due process of law requirements and, accordingly, we affirm the judgment of the Court of Chancery.

I.

The Sequestration Statute, 10 *Del. C.* § 366, has been an integral part of our law since 1927.[1] 35 *Del. L.* ch. 217;

1. In its present form 10 *Del. C.* § 366 provides:

"(a) If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such nonresident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for 3 consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

(b) The Court may make all necessary rules respecting the form of process, the manner of issuance and return thereof, the release of such property from seizure and for

Sands v. Lefcourt Realty Corporation, Del. Supr., 117 A. 2d 365 (1955). Over the years since then a long line of cases has established the purpose of the Statute, its rationale and the procedure thereunder. Reference is made to those cases for a full definition of such matters.[2]

In *Ownbey v. Morgan,* 256 U. S. 94, 41 S. Ct. 433 (1921), the United States Supreme Court held that the Delaware foreign attachment statute was constitutional and, since the equitable remedy under § 366 is analogous to foreign attachment, *Sands v. Lefcourt Realty Corporation* supra, it is fair to say that *Ownbey* has been long regarded by the Court of this State as authority for the constitutionality of the Sequestration Statute. Cf. *Wiley v. Copeland,* Del. Supr., 349 A. 2d 211 (1975); *Gordon v. Michel* supra.

By its nature a foreign attachment, whether legal or equitable, involves a prejudgment seizure of property as a basis for jurisdiction and/or as a source of satisfaction for any judgment ultimately awarded on the merits of the claim. Such a proceeding has the seeds if not the fruits of

1. (Cont'd.)

the sale of the property so seized, and may require the plaintiff to give approved security to abide any order of the Court respecting the property.

"(c) Any transfer or assignment of the property so seized after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized and sold and such sale and confirmation shall transfer to the purchaser all the right, title and interest of the defendant in and to the property as fully as if the defendant had transferred the same to the purchaser in accordance with law."

2. See, for example, *Sands v. Lefcourt Realty Corporation* supra; *Greene v. Johnson,* Del. Supr., 99 A. 2d 627 (1953); *Loft, Inc. v. Guth,* Del. Supr., 19 A. 2d 721 (1941); *Gordon v. Michel,* Del. Ch. 297 A. 2d 420 (1972); *Trans World Airlines, Inc. v. Hughes Tool Company,* Del. Ch., 187 A. 2d 350 (1962); *Cantor v. Sachs,* Del. Ch., 162 A. 73 (1932); Folk, *The Delaware General Corporation Law,* p. 565.

unfairness in permitting the impounding of property before judgment and, under some circumstances, upon thin assertions of right. But, as the discussion by Justice Pitney in *Ownbey* demonstrates, the practice traces its origin to early colonial days and, indeed, beyond them to the "custom of London." In law, however, as in the life it reflects, what is old is not necessarily good. Neither, we hasten to add, is it necessarily bad. But, as we are often reminded, due process concepts involve evolving standards of fairness and so the test for constitutionality is necessarily dynamic. Much has been decided and written about such concepts in recent years including their implications for Delaware sequestration procedures. See, for example, the thoughtful study by Folk and Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 Colum. L. Rev. 749 (1973).

For present purposes the current due process standards must largely be distilled from a quartet of decisions by the United States Supreme Court, all of which involved prejudgment seizures of property; they are: *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, – U. S. –, 95 S. Ct. 719 (1975); *Mitchell v. W. T. Grant Company*, 416 U. S. 600, 94 S. Ct. 1895 (1974); *Fuentes v. Shevin*, 407 U. S. 67, 92 S. Ct. 1983 (1972); *Sniadach v. Family Finance Corp.*, 395 U. S. 337, 89 S. Ct. 1820 (1969).

Those decisions provide a foundation for renewed constitutional attack upon the Sequestration Statute. The argument seems first to have been made in the Court of Chancery in *Gordon v. Michel* supra, but it was rejected as the Court concluded that *Ownbey* remained viable and that 10 *Del. C.* § 366 still passed constitutional muster. Following *Gordon* other Chancery decisions reached the same result. Then in *Wiley v. Copeland* supra this Court, in a brief *per curiam* opinion, found § 366 constitutional on the same rationale announced in *Gordon*.

This appeal came on for hearing shortly after *Wiley* was decided but we permitted full exploration of the issues in briefing and at oral argument because of the important questions involved, and because certain arguments are made herein which were not fully answered in *Wiley*.

Against that background, we now focus on this appeal.

II.

This is a stockholder's action, derivative in character and brought on behalf of The Greyhound Corporation (Greyhound) against some twenty-eight individuals (defendants) including directors of Greyhound (or its corporate predecessors) who served at various times between 1957 and 1974. The complaint alleges that Greyhound suffered significant loss and damage as a result of conduct by defendants which is said to have caused Greyhound to be found (by the United States District Court for the Northern District of Illinois) in violation of certain antitrust laws. The complaint also attacks the distribution of benefits under Greyhound's deferred compensation and stock option plans.

None of the defendants is a Delaware resident, all were served under the Sequestration Statute and relevant Rules of the Court of Chancery. Apparently, the Court-appointed Sequestrator seized certain Greyhound shares of stock and/or contract rights which defendants, respectively, had under agreements with Greyhound. The Court of Chancery denied both a motion by the individual defendants to dismiss the complaint for lack of jurisdiction and a motion by all defendants to vacate the order of sequestration. This appeal followed.

III.

The thrust of defendants' argument is that the sequestration procedure is inconsistent with controlling constitu-

tional principles. They say that the procedure, including that which obligates them to appear generally before defending on the merits, violates their right to due process of law.

Defendants argue that the minimum contacts requirements of *International Shoe Co. v. Washington*, 326 U. S. 310, 66 S. Ct. 154 (1945), must be met before *personam* jurisdiction is assumed and they say that they are entitled to a meaningful right to be heard under *Boddie v. Connecticut*, 401 U. S. 371, 91 S. Ct. 280 (1971), before their property may be seized. And, they continue, the passage of time and changing concepts of due process "have rendered *Ownbey* obsolete."

A.

There are significant constitutional questions at issue here but we say at once that we do not deem the rule of *International Shoe* to be one of them. An argument based on that case was made in *Breech v. Hughes Tool Company*, Del. Supr., 189 A. 2d 428 (1963), and rejected by this Court. Compare *Hibou, Inc. v. Ramsing*, Del. Super., 324 A. 2d 777 (1974). We are not persuaded that *Breech* should now be abandoned. The reason, of course, is that jurisdiction under § 366 remains, as it was in 1963, *quasi in rem* founded on the presence of capital stock here, not on prior contact by defendants with this forum. Under 8 *Del. C.* § 169 [3] the "situs of the ownership of the capital stock of all corporations existing under the laws of this State . . . [is] in this State", and that provides the initial

3. 8 *Del. C.* § 169 reads in full as follows:

"For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State."

basis for jurisdiction. Delaware may constitutionally establish situs of such shares here, *Rogers v. Guaranty Trust Co. of New York*, 288 U. S. 123, 53 S. Ct. 295 (1932); *Jellenik v. Huron Cooper Min. Co.*, 177 U. S. 1, 20 S. Ct. 559 (1900), it has done so and the presence thereof provides the foundation for § 366 in this case. Cf. *Breech v. Hughes Tool Company* supra. On this issue we agree with the analysis made and the conclusion reached by Judge Stapleton in *U. S. Industries, Inc. v. Gregg*, D. Del., 348 F. Supp. 1004 (1972).

We hold that seizure of the Greyhound shares is not invalid because plaintiff has failed to meet the prior contacts tests of *International Shoe*.

As to *Boddie*, we agree that it contains an important summary of due process requirements, including a "meaningful opportunity" to be heard before one is deprived of any significant property interest. But the implications of *Boddie* for this appeal may best be understood, not by reference to its general principles but in light of an analysis of *Sniadach, Fuentes, Mitchell* and other cases dealing with foreign attachments. And now we turn to those cases.

B.

In *Sniadach*, decided in 1969, the Supreme Court invalidated on due process grounds a Wisconsin statute which authorized garnishment of wages, at the request of a creditor's lawyer, before trial without any opportunity for the wage owner to be heard or to tender a defense. In the absence of "notice and a prior hearing," said the Court, the procedure was deemed unconstitutional. But, writing for the Court, Justice Douglas recognized an *Ownbey* exception in so many words; after referring to seizure without notice or hearing he said:

> "Such summary procedure may well meet the requirements of due process in extraordinary situations . . . . *Ownbey v. Morgan*. . . ." 395 U. S. at 339, 89 S. Ct. at 1821.

Some three years later the Court decided *Fuentes*, in which it invalidated Florida and Pennsylvania prejudgment replevin statutes applied to household goods sold under conditional contracts. The statutes denied the purchasers the opportunity to be heard before seizure and that, said the Court, violated due process, in each instance. The writ issued on bare assertions of right and in neither State was a judge involved. Speaking for the Court, Justice Stewart said:

> "We hold that the Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor. . . ." 407 U. S. at 97, 92 S. Ct. at 2002.

But, citing *Boddie*, he stated that there "are 'extraordinary situations' that justify postponing notice and opportunity for a hearing"; and he added a footnote, saying:

> "In three cases, the Court has allowed the attachment of property without a prior hearing. In one, the attachment was necessary to protect the public against the same sort of immediate harm involved in the seizure cases—a bank failure. *Coffin Brothers & Co. v. Bennett*, 277 U. S. 29, 48 S. Ct. 422, 72 L. Ed. 768. Another case involved attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest. *Ownbey v. Morgan*, 256 U. S. 94, 41 S. Ct. 433, 65 L. Ed. 837." *Fuentes v. Shevin* supra 407 U. S. at 91, 92 S. Ct. at 1999, n. 23.

Two years later the Court decided *Astol Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U. S. 663, 94 S. Ct. 2080 (1974), in which, citing *Fuentes*, *Sniadach* and *Boddie* it again found and applied in Justice Brennan's language "one of those 'extraordinary situations' that justify postponing notice and opportunity for a hearing." In applying the "limited circumstance" test stated in *Fuentes*, he noted that the seizure (of a yacht) served a significant governmental purpose by permitting Puerto Rico to assert *in rem* jurisdiction over the property in order to conduct forfeiture proceedings; the following footnote was cited to that quotation, again implicitly approving *Ownbey:*

> "Cf. *Ownbey v. Morgan*, 256 U. S. 94, 65 L. Ed 837, 41 S. Ct. 433, 17 ALR 873 (1921), cited with approval in *Fuentes v. Shevin* supra, at 91 n. 23, 32 L. Ed. 2d 556."

It seems clear from the writing of three different Justices in the above three cases that until May 15, 1974 *Ownbey* was still viable for some purposes; indeed, all three had referred to the case by name, with explicit or implicit approval.

The next case in time, *Mitchell*, was also decided in 1974. There Justice White referred to prejudgment seizures approved under the special circumstances found in *Ewing v. Mytinger and Casselberry*, 339 U. S. 594, 70 S. Ct. 870 (1950) and then said,

> "More precisely in point, the Court had unanimously approved prejudgment attachment liens effected by creditors, without notice, hear-

ing, or judicial order, saying that 'nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its affect upon the result of the suit.' 'The fact that the execution is issued in the first instance by an agent of the State but not from a court, followed as it is by personal notice and a right to take the case into court, is a familiar method in Georgia and is open to no objection.' Coffin Brothers v. Bennett. . . . To the same effect was the earlier case of Ownbey v. Morgan. . . . Furthermore, based on *Ownbey* and *Coffin*, the Court later sustained the constitutionality of the Maine attachment statute. McKay v. McInnes, 279 U. S. 820, 49 S. Ct. 344, 73 L. Ed. 975 (1928).

. . .

The judgment of the Maine court was affirmed without opinion citing *Ownbey* and *Coffin.*" *Mitchell v. W. T. Grant Company* supra, — U. S. at —, 94 S. Ct. at 1903.

While the Court's discussion of *Ownbey* is arguably less than explicit approval, it seems clear that it was not overruled and, indeed, in our view the Court looked to it as precedent for approval of the Louisiana sequestration statute in *Mitchell.*

In 1975 the Court decided *North Georgia Finishing, Inc. v. Di-Chem, Inc.* supra, in which it invalidated a Georgia garnishment statute that permitted prejudgment seizure of property on an affidavit of plaintiff or his attorney. The Court noted that in *Fuentes*, Fourteenth Amendment violations were found "[b]ecause the official seizures had been carried out without notice and without opportunity for a hearing or other safeguard against mistaken

repossession" and, said Justice White for the Court, "[t]he Georgia statute is vulnerable for the same reasons." While his opinion does not refer to *Ownbey,* the concurrence by Justice Powell cites it as an illustration of "unanimously approved prejudgment attachment liens" under the "traditional view of procedural due process."

C.

While the significance of these decisions for foreign attachment statutes in the States is by no means complete, or clear, we can, we think, draw two inferences from what the Court has said about *Ownbey.* First, an attachment which is necessary to secure jurisdiction in a State court is an "extraordinary situation" under *Boddie. Fuentes* so holds in so many words (denoting it as "clearly a most basic and important public interest") and the same view is echoed in *Astol Calero-Toledo,* in *Mitchell* and by Justice Powell in his concurring opinion in *North Georgia.* The second inference is that, given an "extraordinary situation", pre-seizure notice and hearing are not required by the due process clause,[4] *Jonnet v. Dallas Savings Bank,* 3 Cir. — F. 2d — (1976). Those inferences seem reasonable and they are certainly addressed to the common sense of what is involved: prior notice of seizure would permit a defendant to divest the court of a jurisdiction which, by definition, it has over the *res*—he could simply take it out of the State or defeat jurisdiction by a transfer of title.

4. It is not clear whether the presence of adequate safeguards alone will comport with due process where there was no pre-seizure notice and hearing, or whether the safeguard procedure is available only under extraordinary situations as identified in *Boddie.* We need not decide the question because, for the reasons already stated, we think that the United States Supreme Court has said that *Ownbey* qualified under *Boddie* and so, inferentially, does § 366.

And a plaintiff would thus lose a right, which he would otherwise have, to take the case into court. We hold that § 366 is not unconstitutional because seizure precedes notice and hearing.

In *North Georgia* the Supreme Court based its ruling on the absence of "notice and . . . opportunity for a hearing or other safeguard." The disjunctive character of that quotation from Justice White supports our conclusion that prior notice and hearing are not mandated by the Fourteenth Amendment. But "other safeguards" are required if the sequestration procedure is to square with the Constitution. So we must now examine § 366 from that point of view. Precisely what requirements the Court has in mind for safeguards is not certain but some insight is available from what it has approved and what it has criticized. It has said, for example, that there must be a hearing and judicial determination "before one is finally deprived of his property," *Mitchell v. W. T. Grant Company*, supra. And in *North Georgia* the Court made a number of criticisms about the procedure, including the fact that the writ issued at the order of a clerk without participation by a judge, the affidavit was sufficient with conclusory allegations made by an attorney without personal knowledge of the facts, the debtor was deprived of the use of the property and there was no provision for an early hearing.

Since the requirements of due process "are not technical, nor is any particular form of procedure necessary," *Mitchell v. W. T. Grant Company* supra, we deem it unnecessary to litmus test Delaware sequestration procedure against every facet of the foreign attachment proceedings approved or invalidated in the governing cases we have reviewed. We review, rather, certain of the significant features of the Delaware procedure which seem relevant to the respective interests of the parties.

D.

As the Third Circuit said in *Jonnet*, a plaintiff has two interests in invoking foreign attachment procedures: to establish jurisdiction in the forum and to restrain a *res* within the control of the Court for eventual payment of a judgment. In Delaware the first of these is the principal and under most circumstances the exclusive basis for sequestration. Indeed, by its terms § 366 permits the "Court [to] . . . compel the appearance of the defendant by the seizure," a purpose underscored by the cases. Cf. *Sands v. Lefcourt Realty Corporation* supra; *Gordon v. Michel* supra.

On this point we pause to note, as did the Vice Chancellor, that *Sniadach, Fuentes, Mitchell* and *Georgia* all involved prejudgment seizures, by attachment proceedings, for the purpose of collecting moneys claimed to be owed. And so did the most recent decision by the Supreme Court on this question: *Carey v. Bert Randolph Sugar*, – U. S. –, – S. Ct. –, 44 L. W. 4416 (3/24/76). All of those cases involve claims by creditors against resident debtors, none sought attachment to establish state jurisdiction which is what this appeal is all about.[5] While that difference may be determinative in distinguishing this case from creditor type cases, we do not base our conclusion on it.

As to safeguards or protection of a defendant's interest, the following appear significant to us:

(1) An order of Court is required to initiate the § 366 process and, beyond doubt, that requires an order of a Judge of the Court of Chancery who has control of the process at all times.

5. The statute permits seizure only if defendant is a non-resident. See § 366, *Wife v. Husband*, Del. Ch., 271 A. 2d 51 (1970). Compare *Astol Calero-Toledo v. Pearson Yacht Leasing Co.* supra.

(2) The property to be seized must be identified with reasonable certainty in the Court order.[6] *Cannon v. Union Chemical & Materials Corp.*, Del. Ch., 144 A. 2d 145 (1958). Compare *Baker v. Gotz*, D. Del. 336 F. Supp. 197 (1971); aff'd 492 F. 2d 1238; cert. den. 417 U. S. 955, 94 S. Ct. 3084 (1974).

(3) The value of the property seized must be reasonably related to the amount of the claim asserted.[7] *Trans World Airlines, Inc. v. Hughes*, Del. Ch., 185 A. 2d 762 (1962), aff'd 185 A. 2d 886 (1962).

(4) Following seizure, notice thereof must be promptly given to defendant. § 366, Chancery Rule 4(db).

6. Chancery Rule 4(db) provides in part:

> "No order shall be entered under 10 *Del. C.* § 366 unless it appears in the complaint that the defendant or any one or more of the defendants is a nonresident of the State of Delaware and the application therefor is accompanied by the affidavit of a plaintiff or other credible person stating:
>
> (a) As to each nonresident defendant whose appearance is sought to be compelled, his last known address or a statement that such address is unknown and cannot with due diligence be ascertained.
>
> (b) The following information as to the property of each such defendant sought to be seized:
>
> (1) A reasonable description thereof.
>
> (2) The estimated amount and value thereof.
>
> (3) The nature of the defendant's title or interest therein; and if such title or interest be equitable in nature, the name of the holder of the legal title.
>
> (4) The source of affiant's information as to any of the items as to which the affidavit is made on information and belief.
>
> (5) The reason for the omission of any of the required statements."

7. Sequestration is available only when a money judgment is sought. *Steinberg v. Shields*, Del. Ch., 152 A. 2d 113 (1959).

(5) A general appearance is required before release of property seized, but under both the statute and the Chancery practice a defendant has a right to appear solely for the purpose of attacking compliance with § 366 and the Rules of Court.[8] *Schwartz v. Miner*, Del. Ch., 133 A. 2d 599 (1957). Indeed, defendants are doing that very thing here without having made a general appearance. If sequestration is determined to be valid, each defendant has an option to appear generally or not.[9] *Schwartz v. Miner* supra.

(6) After seizure a defendant who has entered a general appearance may petition for release of the property and the "Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured."

(7) A defendant who elects to appear generally after seizure will be called upon to litigate only those causes of action asserted against him in the original complaint; he may not be confronted with new causes of action. *Tenney v. Jacobs*, Del. Supr., 240 A. 2d 138 (1968); *Townsend Corporation of America v. Davidson*, Del. Ch., 181 A. 2d 219 (1962).

(8) While the property seized is in the control of the Court, a defendant does not lose all rights over it.

8. Such an appearance is made under Chancery Rule 12(b) by filing a motion to dismiss for lack of jurisdiction. In earlier days a "special appearance" was permissible for the same purpose. See, for example, *Whitman v. San Francisco Bay Toll Bridge Co.*, Del. Ch., 142 A. 783 (1928).

9. Discovery is available for the purpose of determining whether there has been an effective sequestration, cf. *Kolyba v. Banque Nationale de Paris*, Del. Ch., 316 A. 2d 585 (1973), but it may not be had for a fishing expedition to find property subject to seizure. *Chavin v. Gluck*, Del. Ch., 216 A. 2d 142 (1965).

Thus the sequestration order entered in this case, which follows what we understand to be the usual practice, states:

> "4. In the event that the defendants or any one of them shall make a bona fide sale or sales of any of the aforesaid property seized hereunder, and shall receive therefor not less than the market price at the time of sale and shall deposit with the Sequestrator the proceeds of such sale or sales, the Sequestrator shall forthwith advise the Greyhound Corporation of such facts and thereupon the property sequestered and seized and so sold shall be released from such sequestration and seizure without further action of any kind by the Sequestrator or this Court; and in such event, the proceeds of any such sale shall be held by the Sequestrator until further order of this Court in lieu of the property initially seized and so sold; provided, further, that the proceeds of any such sale or sales shall be subject to investment and reinvestment by the Sequestrator in such property and upon such terms and conditions as the defendants may from time to time direct in writing, provided always that the property in which such proceeds are invested and reinvested (as well as any uninvested proceeds of any sale of such property) shall be held by and in the name of the Sequestrator, pursuant to the terms of this Order and until further Order of this Court.
>
> "In the event that said Greyhound Corporation shall desire to make any payments under any agreements, contract or other legal instrument of any kind whatsoever between any of said defendants and said corporation being seized under this Order by the Sequestrator, any such obligations, rights, debts or credits may be discharged by the payment of the sums due from said corporation, as may be appropriate, to the Sequestrator and said corporation, as may be appropriate, may receive a full and complete discharge of said contractual obligations, rights, debts or credits from each or any of said defendants, and the Sequestrator hereinbefore appointed; and in such event, the proceeds of the payment of any of the aforesaid contractual obligations, rights debts or credits shall be held by the Sequestrator until the further order of this Court in lieu of the contractual obligations, rights, debts, or credits initially seized and so paid or discharged, provided further that the proceeds of any such payment or payments shall be subject to investment and reinvestment by the Sequestrator upon such terms and conditions as each or any of said defendants may from time to time direct in writing; provided always that the property in which such proceeds are invested and reinvested (as well as any uninvested proceeds of any such payment) shall be held by and in the Sequestrator, pursuant to the terms of this Order and until the further Order of this Court."

In addition to those safeguards, we think that there is another (from a defendant's point of view) which has not been emphasized in the cases but which is implicit in § 366. The statute permits a defendant who has appeared generally to petition for release of seized property and

> "[t]he Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable pos-

> sibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured."

In order to make such a determination the Court of necessity must be informed not only of the value of the property seized but also of what effect release of the property will have on satisfaction of any judgment which plaintiff may secure. To know that, *i.e.*, what judgment may be secured, the Court must be informed about the possible amount of such judgment and, clearly, that means at least some preliminary inquiry into the merits of the claim. Cf. *Carey v. Bert Randolph Sugar* supra. Compare Vice Chancellor Marvel's 1969 ruling in *Trans World Airlines, Inc. v. Hughes* supra in which he said that ". . . of course, the property . . . seized should always bear some reasonable relationship to the amount of the claim asserted." Manifestly, the complaint or other statement by a plaintiff cannot be conclusive on the value or merits of the claim.

In sum, the sequestration procedure is at all times under the control of a judge; a defendant has a right to litigate compliance with the Statute and the Rules of Court without appearing generally; if the Court determines that there has been a valid seizure a defendant may then elect to appear generally; if he does so appear he is entitled to release of the property unless plaintiff meets the statutory terms; and a defendant is entitled to a hearing to test the reasonableness of the value of the property seized, including to the extent pertinent, the merits of plaintiff's claim.

In our view, § 366 and the related procedures provide a reasonable balancing of interests between plaintiff and defendants and assure to the latter the safeguards required under current guidelines established by the United States Supreme Court.

E.

Defendants argue also that compelling them to make a general appearance before defending on the merits violates their right to due process. They rely principally on decisions by Courts in New York holding that an obligation under a liability insurance policy may be a basis for jurisdiction over personal injury litigation, but liability of a non-resident defendant who appears is limited to the face value of the policy. *Farrell v. Piedmont Aviation, Inc.*, 2d Cir., 411 F. 2d 812 (1969); *Minichiello v. Rosenberg*, 2d Cir., 410 F. 2d 106 (1968), cert. den., 396 U. S. 844, 90 S. Ct. 69, 24 L. Ed. 2d 94 (1969); *Jarvik v. Magic Mountain Corp., S. D. N. Y.*, 290 F. Supp. 998 (1968); *Simpson v. Loehmann*, N. Y. App., 234 N. E. 2d 669 (1967); rearg. den., 238 N. E. 2d 319 (1968).

We do not regard the rationale of those cases as persuasive authority for the due process argument which defendants make here. As the cited cases indicate, the theory of suit and the practice thereunder spawned a considerable volume of Federal-State litigation which has apparently resulted in settled law in New York. But the attachment theory and the limited liability imposed on an appearing defendant have apparently been adopted only in New York. See *Ann.* 33 A. L. R. 3d 992. And even in New York the doctrine is limited to claims based on an insurance policy. Thus in *Simpson v. Loehmann* the New York Court of Appeals said:

> "This, it is hardly necessary to add, means that there may not be any recovery against the defendant in this sort of case in an amount greater than the face value of such insurance policy even though he proceeds with the defense on the merits. Consideration of CPLR 320 (subd. [c])

and its effect in other types of action begun by attachment must, of course, await future cases." 238 N. E. 2d at 320.

We decline to proceed here on the basis of what New York alone has done in personal injury claims under insurance policies.

We agree with Judge Stapleton also when he said in *U. S. Industries*, 58 F. R. D. at 479, that there is a "legitimate public interest behind the general appearance rule"; it promotes judicial economy by concentrating the settlement of claims in one jurisdiction or action. And, that is particularly desirable in the kind of controversy here involved. According to the amended complaint, this is essentially an intra-corporate dispute between a complaining shareholder, who sues for the corporation, alleging loss and damage resulting from conduct of defendants in their respective capacities as directors and/or officers of Greyhound. The charges are that defendants caused the Corporation to be in contempt of orders of the United States District Court for which substantial fines were imposed on Greyhound, caused Greyhound to violate the anti-trust laws, and unjustly enriched themselves through stock options and deferred compensation plans. Such a controversy surely has a substantial relationship to this forum, *Folk and Moyer* supra, and litigation here will eliminate the possibility of duplicate actions elsewhere with varying results.

We hold that § 366 is not unconstitutional because it requires defendants to appear generally before defending on the merits.

IV.

Defendants argue also that the sequestration procedure is unconstitutional as applied to the interests of

security holders whose certificates are located outside the State. They say that the certificates for the seized shares are physically outside Delaware and that the statutory attempt under 8 *Del. C.* § 169 to reserve the situs of shares here is "to indulge in a fiction."

The argument is based largely, if not exclusively, on the right of a bona fide purchaser who acquires a certificate and, so far as we are informed, there is no such purchaser among defendants. As to these defendants, we have already determined that the shares have a situs here, *Rogers v. Guaranty Trust Co. of New York* supra; *Jellenik v. Huron Copper Min. Co.* supra; *U. S. Industries, Inc. v. Gregg* supra; compare *Breech v. Hughes Tool Company* supra, and, for present purposes that is conclusive on this contention.

V.

Finally, we turn to the argument made by Greyhound Corporation, for whose benefit plaintiff alleges that he sues.

Greyhound says that the sequestration order deprives it of property without due process of law. It attacks that part of the order under which the Sequestrator directed it "not to transfer or permit to be transferred any of said shares of stock," (*i.e.*, the seized shares) except pursuant to Court order. Relying on *Haas v. Haas*, Del. Ch., 119 A. 2d 358 (1955), Greyhound argues that the individual defendants retain the power to pass good title to their shares to a good faith purchaser and that under the Uniform Commercial Code (6 *Del. C.* §§ 8-301, 8-102, 8-105) such a transferee would take title unaffected by the sequestration proceedings; and, Greyhound continues, it would be obliged to transfer the shares on its books or be

liable for any loss resulting from a refusal or a delay in doing so. 6 *Del. C.* § 8-401(2).[10]

The Vice Chancellor disposed of Greyhound's argument on the basis of the Uniform Commercial Code, 5A *Del. C.* § 8-317, which reads:

> "Nothing contained in this subtitle shall repeal, amend or in any way effect the provisions of sections 169 and 324, title 8, or sections 365 and 366, and chapter 35, title 10; and to the extent that any provision of this subtitle is inconsistent with such sections, sections 169 and 324, title 8, and 365 and 366 and chapter 35, title 10, shall be controlling."

He noted the priority of § 366 by the terms of the Uniform Commercial Code and suggested that Greyhound could find protection by complying with the sequestration order and § 8-317.

As to Greyhound's reliance on *Haas*, he said that the conflict there did not involve a sequestration order and UCC priorities, and that defendants remain free to transfer their stock under the order of sequestration and the general practice. Cf. *Trans World Airlines, Inc. v. Hughes Tool Company* supra.

In this Court Greyhound points to a number of situations in which it might be caught in a legal dilemma and be faced with a claim for loss. These all contemplate a transfer by a defendant in violation of the sequestration order or a claim by a bona fide purchaser who was made

10. 6 *Del. C.* § 8-401(2) provides:

> "Where an issuer is under a duty to register a transfer of a security the issuer is also liable to the person presenting it for registration or his principal for loss resulting from any unreasonable delay in registration or from failure or refusal to register the transfer."

so by a defendant under circumstances which violate the order of sequestration.

None of such facts or claimants are before the Court.

We recognize the desirability of quieting fears about the free transferability of shares traded on a national stock exchange but we are not persuaded that that or any other reason advanced by Greyhound provides a basis on which this Court can or should state an opinion. In brief, there is not before us a controversy calling for a judicial judgment, even on a declaratory basis. Accordingly, we decline to decide the issue.

° ° °

Affirmed in all respects except as noted in Section V.

APPENDIX B.

Letter Opinion of Judge Brown

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

GROVER C. BROWN
Vice Chancellor

Court House
Georgetown, Delaware

May 12, 1975

Howard M. Handelman, Esquire
Bayard, Brill & Handelman
300 Market Tower
Wilmington, Delaware 19801

E. N. Carpenter, II, Esquire
Richards, Layton & Finger
4072 DuPont Building
Wilmington, Delaware 19801

Richard F. Corroon, Esquire
Potter, Anderson & Corroon
350 Delaware Trust Building
Wilmington, Delaware 19899

Re: Heitner v. The Greyhound
Corporation, et al.
Civil Action No. 4514
Submitted: November 26, 1974

Gentlemen:

This is a stockholders derivative suit brought against and for the benefit of The Greyhound Corporation, a Delaware corporation, as well as against various nonresident officers and directors of Greyhound. The individual defendants have moved specially to quash and vacate the sequestration order which seeks to compel their appearance in this Court and to thus dismiss the complaint against them. Greyhound has also moved to dismiss. I shall deal with their motions separately.

Because the plaintiff is also a nonresident and because the claims on which the complaint is premised allegedly involve wrongs to the corporation occurring outside this State, the individual defendants charge that the attempt to obtain personal jurisdiction over them through the Delaware sequestration statute constitutes an unconstitutional violation of due process. Defendants rest their position on three primary legal approaches, and, to a degree, the arguments tend to overlap each other. Because of this I feel it only fair to set forth what I perceive each separate thrust to be, with the expectation that if I have unfairly construed any one of them counsel will promptly advise.

The defendants concede that the sequestration statute, 10 *Del. C.* § 366, has been upheld against constitutional attack by the recent decision of this Court in *Gordon v. Michel*, Del. Ch., 297 A. 2d 420 (1972), and by our federal District Court in *U. S. Industries, Inc. v. Gregg*, D. Del., 348 F. Supp. 1004 (1972), and 58 F. R. D. 469 (1973). They suggest, however, that their particular arguments were not considered in *Gordon* and *Gregg* decisions misconstrue the operation of the sequestration statute and therefore should not be followed.

Pervading all of their arguments is the assumption that if the use of the sequestration process is upheld against them under the circumstances of this case, it would permit a nonresident plaintiff to compel the personal appearance of nonresident defendants in a Delaware court, (under the threat of a forfeiture of their property if they did not), by means of a prehearing seizure of property located outside this State based on a complaint which alleges wrongs also

occurring outside of this State. This, the defendants say, can in no way be sanctioned as a proper use of service of process in light of the decisions of the United States Supreme Court in *Sniadach v. Family Finance Corp.*, 395 U. S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820 (1969), *Fuentes v. Shevin*, 407 U. S. 67, 32 L. Ed. 556, 92 S. Ct. 1983 (1972), *Mitchell v. W. T. Grant Co.*, – U. S. –, 40 L. Ed. 2d 406, – S. Ct. – (1974), and their various precedential stepchildren. While the picture of the situation as painted by the defendants may evoke an initial wave of sympathy, I feel for reasons expressed hereafter that not all of the elements assumed by them are legally correct.

Also, in view of the recent wealth of judicial decision that has emerged from the swirling and infectious dust of *Sniadach* and *Fuentes*, I feel it appropriate to note a few distinctions at the outset. In the main those cases and their descendants dealt with suits between creditors and debtors wherein the ability of the plaintiff to obtain jurisdiction over the defendant was not in issue. In addition, while the terms "attachment" and "sequestration" stand for generally recognized legal concepts, their precise operational meaning in a given case may well depend on the purpose for which they are authorized by local statute or court rule. Compare, for instance, *Mitchell v. W. T. Grant Co., supra,* where in Louisiana "sequestration" was the process used for the prehearing seizure of specific property in which both the resident plaintiff and defendant claimed an ownership interest.

The primary purpose of "sequestration" as authorized by 10 *Del. C.* § 366 is not to secure possession of property pending a trial between resident debtors and creditors on the issue of who has the right to retain it. On the contrary, as here employed, "sequestration" is a process used to compel the personal appearance of a nonresident defendant to answer and defend a suit brought against him

in a court of equity. *Sands v. Lefcourt Realty Corp.*, Del. Supr., 177 A. 2d 365 (1955). It is accomplished by the appointment of a sequestrator by this Court to seize and hold property of the nonresident located in this State subject to further Court order. If the defendant enters a general appearance, the sequestered property is routinely released, unless the plaintiff makes special application to continue its seizure, in which event the plaintiff has the burden of proof and persuasion. 10 *Del. C.* § 366; Rule 4(db); and see *Gordon v. Michel, supra,* footnote 1.

Here, what has been sequestered is stock held by the individual defendants in Greyhound, a Delaware corporation. Its purpose is to induce such officers and directors to appear and defend the suit brought against them for the benefit of the corporation. The complaint alleges wrongs to the corporation for which the plaintiff wants them held accountable. The ultimate relief sought is unliquidated damages to the corporation which the plaintiff has the burden to establish. Plaintiff does not want to hold their refrigerators or automobiles pending a hearing; he does not even want to hold their stock at this point. He simply wants it held by an officer appointed by the Court so as to entice them to appear, subject to the condition that if they refuse to appear, and if the Court should thereafter be convinced from the proof that they owe damages to the corporation, so much of their sequestered stock as necessary may be sold to satisfy the obligation. With this recitation as to the function of "sequestration" as applied to this case, I turn now to what I understand to be the arguments of the individual defendants.

I.

First the defendants argue that their Greyhound stock cannot be validly seized by the sequestration order since it is not property actually located in Delaware. They

claim that of the 52 jurisdictions that have adopted the Uniform Commercial Code, all but Delaware provide that no attachment of any security or share is valid until the security is actually seized. While acknowledging that 8 *Del. C.* § 169 provides that the "situs of the ownership" of all capital stock of a Delaware corporation is regarded as being in this State for purposes of "title, action, attachment, garnishment and jurisdiction of all courts held in this State," they argue that this is a pure fiction. They say that Delaware has no "control" over the property seized, i.e., the stock certificates, as required by the venerable decision of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565 (1878), but rather it only has control over the corporation that issued the stock. They say that control of the corporation gives no control over the transfer of its shares by shareholders such as the individual defendants. They point out that this was expressly recognized by this Court in *Haas v. Haas*, Del. Ch., 119 A. 2d 358 (1955). Finally, they theorize, since Delaware's Uniform Commercial Code recognizes that a bona fide purchaser without notice acquires a clear title to stock upon delivery of the certificate, as did *Haas v. Haas* under the previous Uniform Stock Transfer Act, there can be no valid seizure of corporate stock unless the certificates themselves are within this Court's jurisdiction.

The *Haas* case, on which defendants place great reliance, involved a suit by a wife against both her husband and General Motors Corporation to compel shares of stock then registered in the husband's name as a result of his fraudulent actions to be reregistered in the joint names of the husband and wife. Prior to this suit the husband had pledged the stock to a Florida bank as collateral for a loan on which he became in default. The court issued a restraining order against the husband and General Motors but, as it noted, it "did not then obtain actual control of

the certificates." 119 A. 2d 360. Subsequent to the restraining order the husband directed the bank to sell the stock so as to pay off the loan, which the bank proceeded to do without knowledge of the Delaware Court proceedings which enjoined his right to transfer. General Motors refused to make the transfer because of the restraining order and the bank intervened as a defendant. Plaintiff sought to dismiss its petition for failure to state a claim, but this motion was denied by the Chancellor. He reasoned under the Uniform Stock Transfer Act (which was then in force) that where a transfer is made by a delivery of certificates and stock powers which are regular on their face, a purchaser without knowledge becomes a bona fide holder for value, and such status is not lost even though an action is pending and a restraining order against the transfer is outstanding. Thus he held that a claim had been stated.

From this the defendant would magically transform statutory rights which protect a bona fide purchaser for value under certain circumstances into the legal principle that the situs of the ownership interests in a Delaware corporation follow and depend upon the location of the stock certificate despite the language of 8 *Del. C.* § 169 to the contrary. I do not agree with this rationalization.

In adopting the Uniform Commercial Code, Delaware intentionally omitted the recommended language of the act which would have mandated the conclusion sought by the defendants. In addition, it was specifically provided that nothing in the Code should in any way affect the provisions of 8 *Del. C.* § 169 and 10 *Del. C.* § 366, among others. See 5A *Del. C.* § 8-317 and the comment thereto. This does not seem to be unreasonable. A shareholder owns a proportionate interest in his corporation which is represented by a stock certificate as well as being reflected on the corporate stock ledger.

Sequestration seeks to seize his ownership interest in the corporation, not merely his documentary indicia of ownership. Thus the fact that a shareholder has the right to transfer his ownership interest in the corporation to another by endorsement and delivery of the certificate offers no foundation for the proposition that the property interest represented by it departs this State's jurisdiction when the certificate crosses the border. Under this theory, a judgment debtor could avoid attachment of his auto, for instance, by simply mailing his title across the state line. Likewise, I presume, a stockholder who lost his certificate could not have his stock interest attached by any court, any where in the event he chose not to seek a new one.

Even in *Haas* it was noted that "for certain purposes such property [stock] has its situs in Delaware and the Uniform Stock Transfer Act does not alter this conclusion." 119 A. 2d 362. See also *U. S. Industries, Inc. v. Gregg* at 348 F. Supp. 1020 where it was observed that it is constitutionally proper for a state to provide "as Delaware has done," that the situs of the capital stock of its corporations is in the home state.

I cannot conclude that the sequestration of defendants' stock and stock interests is invalid here simply because the stock certificates themselves may be beyond the Court's jurisdiction.

II.

Secondly, defendants contend that sequestration is unconstitutional since it allows a seizure of their property without notice and with no provision whatever for a hearing as to the propriety of the seizure. While conceding for the purpose of this theory that *Gordon v. Michel, supra,* is at present dispositive of the need for notice and a hearing prior to the seizure of their stock, they argue that *Mitchell v. W. T. Grant Co., supra,* mandates that this is

permissible only if the defendant has available to him the means for a prompt and meaningful post-seizure hearing. They point out that under 10 *Del. C.* § 366 a nonresident defendant whose property has been sequestered cannot obtain a post-seizure hearing unless he first submits to *in personam* jurisdiction, and then the hearing to which he becomes entitled goes to the merits of the plaintiff's claim and his right to recover a personal judgment against him rather than to the justification for the sequestration in the first instance. They suggest that this amounts to no hearing at all on the seizure issue.

The short answer to this is that the authorities upon which defendants rely require a prompt hearing to determine whether or not the attachment was proper or if it should be dissolved and the property returned. Under 10 *Del. C.* § 366 the general appearance of the nonresident in the action authorizes him to petition for the immediate release of his property, and a hearing becomes necessary only if the plaintiff opposes this release in an effort to establish some assurance of payment for the judgment he hopes to recover. Thus, under Delaware sequestration, the property can be released from the attachment or a hearing initiated, if necessary, just as soon as the defendant chooses to appear. Assuming arguendo that it is proper to compel his appearance in this manner, then the promptness with which the sequestration is terminated or a hearing convened lies, in the first instance, in the hands of the defendant. Consequently, I cannot conceive that that the failure of either the statute or the Court rules to specifically require a hearing after the seizure is fatal under the rationale of *Mitchell.* (Defendants contend that it is not proper to compel their personal appearance in this way even if they do have attachable property interests in Delaware, but a discussion of this aspect of their motion is best suited for another segment hereof.)

Defendants further argue that under *Fuentes* and *Mitchell* three elements are necessary to constitutionally justify the omission of a pre-seizure hearing, regardless of its purpose. They suggest that these three elements are (1) a legitimate state interest, (2) a need for prompt action and (3) strict control by the state over the monopoly of its legitimate force. Their argument on the need for prompt action is bottomed on their assumption that stock ownership interests are not attachable where the stock certificates themselves are beyond the reach of the Court's jurisdiction. Since this theory has been rejected, there is no need to deal with it further here.

The argument as to a legitimate state interest also relies to a degree on this non-reachable property theory, and likewise loses this measure of its force. In addition, defendants urge that there can be no legitimate state interest such as sanctioned in *Gordon v. Michel* where the plaintiff is also a nonresident and where the cause of action arose outside the state. In *Gordon* it was held that the "interest of a state in aiding *its citizens* in prosecuting claims against nonresident defendants with property in the state has long been recognized." 297 A. 2d 422. (Emphasis added.) But, defendants argue, this protective justification does not hold true where the plaintiff is not a citizen of the state.

In this approach, however, it seems to me that the defendants unfairly characterize the suit as an attempt by one nonresident to use the Delaware courts and sequestration process to recover a damage claim against other nonresidents. If this was all there was to it, their objection might be more persuasive. What this characterization overlooks, however, is that this is a derivative action brought to redress wrongs allegedly committed on a corporation which is a creature existing in, under and by virtue of Delaware and its corporate laws. A rectification

of any such wrongs and an appropriate recovery would benefit all stockholders of this Delaware entity, not just the plaintiff stockholder. As stated in *Gordon v. Michel* at 297 A. 2d 422:

> "There is, indeed, a particular valid governmental interest in compelling appearance in a derivative suit in this jurisdiction because the corporation is organized here, an action can always be brought here for its benefit and the regulation of its internal affairs is governed by Delaware law. Speaking generally, a director or officer defendant should be obliged to respond in this jurisdiction which is in a unique position to make an authoritative determination of 'housekeeping' issues and to grant complete relief."

This being true, why should the interest of Delaware in the management and proper operation of its corporate entities be any less simply because the derivative suit is initiated by a nonresident stockholder as opposed to a resident stockholder? Or because the acts and decisions of management which are complained of actually took place in Illinois rather than in New Castle County? In view of the derivative nature of the suit, I do not feel that the fact that the plaintiff-stockholder here is a nonresident and that the alleged wrongs occurred in another jurisdiction distinguish this situation from *Gordon v. Michel* so as to hold the prehearing sequestration unconstitutional under the authorities cited.

As to the element of strict control by the state over its attachment processes, defendants point out that *Mitchell v. W. T. Grant Co.* was decided after *Gordon v. Michel*, and that consequently this Court has not considered *Mitchell's* requirement that there be provision for

review by a judge or other state official of sufficient authority to determine if a summary seizure without notice is appropriate before such a prehearing attachment can validly issue. They insist that the Delaware sequestration process cannot pass this test. Their reasoning runs as follows.

The sequestration statute contains no provision for review by this Court as to the necessity for its use. By case precedent it is established that a plaintiff is entitled to sequestration as a matter of right as long as his application meets procedural formalities. If the application is formally sound, this Court has no discretion to deny this right. *Breech v. Hughes Tool Co.*, Del. Supr., 189 A. 2d 428 (1963). Nor does the Court have the power to first consider the merits of the claim as a condition to authorizing sequestration. *Trans World Airlines, Inc. v. Hughes*, Del. Ch., 185 A. 2d 762 (1962), aff'd sub nom, *Breech v. Hughes Tool Co., supra.* Thus, it is argued, this Court has no power to prevent the summary use of its sequestration process by an individual and consequently the Delaware procedure lacks the element of judicial control found necessary in *Mitchell* to support a prehearing seizure without notice.

Again, however, I feel that the purpose of Delaware sequestration must be distinguished from an attachment process which enables a plaintiff to seize property held by another pending a trial on the issue of who has the right to keep it. In this latter case, as indicated by Mitchell, there is a need to have a proper authority review the application to evaluate whether there is probable merit to the claim as well as a danger that the property will be removed or dissipated if notice is first given. These same considerations are present in applications for immediate injunctive relief without notice. A procedure which

leaves this determination to the interested plaintiff cannot pass constitutional muster as the recent trend of decision illustrates.

Here, however, the purpose is to compel the appearance of a nonresident who has property within this State. In order to establish the necessity for service by sequestration, there must be a showing that the defendant is a nonresident. In order to establish the right to proceed in this manner, it must also be shown that the nonresident defendant owns property in this State that can be reached by sequestration. This determination is not left to the plaintiff. On the contrary Rule 4(db) of this Court augments § 366 by providing that "[n]o order shall be entered under 10 *Del. C.* § 366" unless the nonresidency of the defendant appears in the complaint and unless the complaint is accompanied by the affidavit of the plaintiff "or other credible person" showing each defendant's last known address and also describing the property sought to be sequestered, giving its estimated value, identifying the nature of the defendant's title or interest, and disclosing the source of the affiant's information. If any of the foregoing are omitted, a reason must be given therefor. Thus both our Court rule and practice do provide for advance judicial review to determine that there is a factual basis for the service of process in this manner. The dual legal basis for its issuance, if the verified facts support it, is nonresidency plus ownership of property within the state. Being a jurisdictional tool only, its usage is not dependent upon the merits of the complaint as was true in *Fuentes* and *Mitchell*. The attachment powers of the state are not set in motion at the whim of the litigant. They are activated only by an order of this Court after it is satisfied that the plaintiff has demonstrated his right to invoke the sequestration statute so as to obtain jurisdiction over the nonresident defendant in an effort to get the merits of his

case before the Court. The *Breech* case, as I construe it, holds that the Court has no discretion to deny this statutory right to process once it is satisfied that a plaintiff has shown factors justifying the need to use it. In effect, this seems consistent with the instruction of *Mitchell*.

I find no basis for holding that 10 *Del. C.* § 366 is unconstitutional in that it fails to provide for strict control by the state in the use of its legitimate forces.

III.

Finally, the individual defendants attack § 366 on the theory that it is not truly an *in rem* proceeding, as held in *U. S. Industries Inc. v. Gregg, supra.* While recognizing that a state can obtain jurisdiction over nonresidents by an *in rem* attachment of their property within the state, *Pennoyer v. Neff, supra,* they argue that in such a case jurisdiction can only be acquired to the extent of the value of the property attached. They say that Delaware's sequestration statute clearly violates this since a nonresident, in order to secure the release of his property, must enter a general *in personam* appearance which thus exposes him to unlimited personal liability which may well exceed the value of the property attached. Thus, they contend, such a nonresident defendant is left with two choices once a sequestration order is issued. He can refuse to appear and run the risk of having his property sold to answer for any damages found due from him in his absence, or, he can submit to personal jurisdiction which the Court could not otherwise acquire and thereby expose himself to potential personal liability without limit.

To illustrate their point, they argue that in a true *in rem* proceeding a defendant has a right to appear for the sole purpose of defending the property attached, but that under Delaware's sequestration procedure he is not permitted to do so. They argue that a person has fundamental due process right to remain immune from personal jurisdiction in a state with which he has no substantial relationship, *International Shoe Co. v. Washington,* 326 U. S. 310, 90 L. Ed. 2d 95, 66 S. Ct. 154 (1945), and that due process further dictates that a waiver of this right is valid only if it results from voluntary action, *Hanson v. Denckla,* 357 U. S. 235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958). Thus, they conclude, if a nonresident is compelled to submit generally to the jurisdiction of a court that otherwise would have none over him, in order to defend his property held by that court, there can be no voluntary waiver of this due process right.

However, I see no compelling reason to deviate from the conclusions of Judge Stapleton in *U. S. Industries Inc. v. Gregg,* before whom these same arguments were apparently advanced. At 348 F. Supp. 1020 he noted as follows:

> "The state of a corporation's domicile may constitutionally provide, as Delaware has done, that the situs of its capital stock is in its home state. Thus, where stock of a domestic corporation is brought before the court, this provides a sufficient basis for the exercise of its *quasi in rem* jurisdiction even though the defendant may be a nonresident who has had no prior contacts with the forum state.
>
> "Gregg attempts to distinguish the relevant authorities by saying that this is not in reality a *quasi in rem* action. He correctly points out that the avowed purpose of Delaware's sequestration statute is to compel a general appearance and thereby produce a basis for *in personam* jurisdiction. While the statute is concededly designed to produce this result, it does not follow that the

> action is not one governed by the rules applicable to *quasi in rem* jurisdiction. Unless and until the nonresident defendant elects to enter a general appearance, the power of the court is limited to the application of the property before the court to the plaintiff's claim."

In short, the action as commenced is one against the property of the nonresident so as to induce his appearance, and at that point it is *quasi in rem* at best. If the nonresident is thereafter personally served or enters a general appearance, the action "also partakes of an in personam character." 6 *Am. Jur. 2d* 571, *Attachment & Garnishment* § 14. To the same effect: *Ownbey v. Morgan,* 256 U. S. 94, 65 L. Ed. 837, 41 S. Ct. 433 (1921); *Nelson v. McCormick, Mich. Supr.,* 54 N. W. 2d 694 (1952); *Sherwood v. Porter,* Ida. Supr., 76 P. 2d 928 (1938).

Moreover, the defendants' argument that sequestration is unconstitutional because it compels them to submit to possible personal liability in excess of the value of the property seized seems to necessarily acknowledge that it is constitutional to compel their appearance through attachment to the extent of that property value. Compare *Pennoyer v. Neff, supra.* Thus it appears that their argument goes more to the effect of any judgment that the plaintiff might recover than it does to his right to compel their personal appearance by sequestration process. It seems to be an argument that it is unconstitutional to compel a nonresident to appear at all where there is a possibility that the plaintiff is seeking to recover an amount in excess of that which the law will allow even though he may be entitled to recover some lesser amount. I do not feel that this constitutes a valid constitutional attack in view of the long established authorities approving Delaware's jurisdictional attachment processes.

I thus find no basis in the arguments of the individual defendants to vacate the sequestration order and to dismiss the complaint against them.

IV.

The final item for consideration is the separate motion of the defendant Greyhound to either quash or modify the sequestration order. This motion stems from the language of the order which authorizes the sequestrator to demand that Greyhound make appropriate entries on its books to show that the securities owned by the individual defendants are being held by the sequestrator and that Greyhound further "do all acts necessary to hold and preserve these securities." The notice given Greyhound by the sequestrator pursuant to the order also directs the corporation "not to transfer or permit to be transferred any of said shares of stock" unless authorized by the sequestration order or subsequent order of the Court.

Greyhound points to the fact that the stock interests sequestered here are represented by negotiable securities, that both the certificates and their owners are outside Delaware, and that there is no order prohibiting the individual defendants from selling or transferring their shares to a purchaser who has no knowledge of these proceedings. Thus it suggests that the individual defendants are free to sell or transfer their stock certificates and retain the proceeds. Greyhound further points out that under the Uniform Commercial Code adopted by Delaware, securities are negotiable instruments, 5A *Del. C.* § 8-301, title passes upon the delivery of the certificate, 5A *Del. C.* § 8-102, and a bona fide purchaser acquires it "free of any adverse claim," 5A *Del. C.* § 8-105.

Greyhound also relies on the construction given to similar provisions of the Uniform Stock Transfer Act by Chancellor Seitz in *Haas v. Haas, supra,* wherein he held

that even though Delaware had jurisdiction to determine ownership of stock under the statute placing its situs in Delaware for certain purposes, it must do so "with a recognition of rights created by virtue of our Uniform Stock Transfer Act." 119 A. 2d 362. The Chancellor further stated as follows at this same reference:

> "The statute giving this Court jurisdiction of such matters simply establishes the mechanics of service upon non-residents . . . and does not purport to freeze rights with respect to the ownership of property which may be brought within its ambit, particularly where 'negotiable' indicia of ownership are outstanding."

Thus, Greyhound's argument continues, since a bona fide purchaser of stock certificates takes free of adverse claims, he is entitled to insist that the issuer register the transfer of shares sold to him whether or not the transfer was rightful. 5A *Del. C.* § 8-401(1)(e). If the issuer refuses to do so or improperly delays, it becomes liable for any loss resulting to the purchaser. 5A *Del. C.* § 8-401(2). Consequently Greyhound asserts that the sequestration order which prohibits it from transferring any stock now owned by the individual defendants clearly exposes it to liability at the suit of a bona fide purchaser, transferee or pledgee of the individual defendants who would have a right under Delaware law to have it transferred.

As additional injury, it suggests that if it is to be bound by the sequestration order the commercial world will soon become aware that despite Delaware's adoption of the Uniform Commercial Code, stocks of Greyhound purchased on a national exchange may not be transferable because of undisclosed liens. This, it says, will cast a shadow over the tradeability of its listed stock and thus the

derivative action ostensibly brought for its benefit will actually cause it immeasurable injury.

Because it contends that in either event it will suffer a deprivation of its property without due process, it asks that the sequestration order either be vacated or else modified so as to exclude negotiable securities from its operation.

Greyhound urges that as a matter of policy its motion should be granted in order to show that Delaware favors the free and open transfer of stock as opposed to the confusion and loss that could flow from purchases of stock without knowledge of court-imposed attachment restrictions on their transfer. I think, however, that the General Assembly spoke to this policy issue when it enacted the modified version of the Uniform Commercial Code in this State. 5A *Del. C.* § 8-317 reads in pertinent part as follows:

> "§ 8-317. Effect on attachment and sequestration laws; attachment or levy upon security
>
> "(1) Nothing contained in this title shall repeal, amend or in any way effect the provisions of sections 169 and 324, title 8, or sections 365 and 366, and chapter 35, title 10; and to the extent that any provision of this title is inconsistent with such sections, sections 169 and 324, title 8, and 365 and 366 and chapter 35, title 10, shall be controlling."

Thus by its terms the Delaware Uniform Commercial Code clearly provides that a proper sequestration, pursuant to 10 *Del. C.* § 366, of corporate stock having its situs in Delaware, pursuant to 8 *Del. C.* § 169, shall not be rendered invalid by any rights otherwise granted to owners or transferees of corporate stock by other provisions of the Code. In view of this I fail to see how it is within my

power to declare as a matter of policy that sequestration is invalid as to securities having their situs in Delaware merely because they are made negotiable upon delivery by other portions of the Code. The intent of the statute would seem to accord some measure of protection to Greyhound if it should refuse to register a transfer because it is complying with the sequestration order and thus 5A *Del. C.* § 8-317.

Two other factors should be noted. First, although *Haas* holds that the status of a bona fide holder for value is not necessarily lost because an action is pending concerning the ownership of stock or a restraining order against its transfer is outstanding, it must be kept in mind that that case involved a suit against the issuer and the record owner to compel a reregistration plus a restraining order against transfer pending a hearing. It did not involve an attachment of the stock by a court-appointed sequestrator. Obviously then, *Haas* arose from a violation of a restraint imposed on the defendants and thus involved no attempt by the Court to exercise control over either the stock certificates or the stock itself because of its situs. No doubt this same result would hold true under the Uniform Commercial Code in a similar factual setting. At the same time, I do not feel that *Haas* requires a reading of any more than what it says, namely, that where one makes a bona fide acquisition of stock from an owner who has been enjoined from transfering it, without knowledge of such restraint, and consequently where the stock itself was never before the court, his title is not necessarily defeated because of the existence of the *in personam* order against his transferor. I see no reason to read it as holding the same result to apply where the action is a *quasi in rem* proceeding to seize the stock itself, especially in light of the aforesaid legislative mandate.

Secondly, as pointed out in *Trans World Airlines, Inc. v. Hughes Tool Company,* Del. Ch., 187 A. 2d 350 (1962), our sequestration practice attempts to minimize the burden placed on one whose stock has been sequestered by giving him the right to control the investment of his seized property pending his appearance. The order does so here by allowing the individual defendants to authorize the transfer and sale of the stock at any time on the condition that the proceeds be deposited with the sequestrator subject to investment and reinvestment by him on such terms and conditions as directed by the defendants. Thus the defendants are free to transfer their stock, and Greyhound is free to register the transfer provided it is done through the sequestrator and the price received is not less than its market value. Also, this Court can permit and consider an application for release from sequestration made by one other than the record owner who claims a prior or superior right to ownership.

In addition, as plaintiff points out, an issuer is only under a duty to register a transfer of securities if, among other things, it has no duty to inquire into adverse claims to them. 5A *Del. C.* § 8-401(1)(c). If it has notice of an adverse claim (as certainly the notice from the sequestrator would provide), it must notify the adverse claimant that it will register the transfer within 30 days unless "an appropriate restraining order, injunction or other process issues from a court of competent jurisdiction." 5A *Del. C.* § 8-403(2)(a). Presumably if such process does issue, the issuer cannot be held liable thereafter for refusing to register the transfer. If court process issued subsequent to a presentation for registration will protect an issuer from liability for failing to do so, I see no reason why process issued prior to such a request would be any less protective.

For these reasons, I feel that Greyhound's fear of liability and loss are more fanciful than real, and similarly I am not convinced that the sequestration order deprives it of property without due process of law.

V.

For the reasons set forth herein, the motions of both the individual defendants and the defendant Greyhound to quash and vacate the order of sequestration and, in the case of the individual defendants, to dismiss the complaint as to them, are hereby denied.

IT IS SO ORDERED.

Very truly yours,

GROVER C. BROWN

GCB:mlw
cc: Register in Chancery

APPENDIX C.

§ 366. Compelling appearance of nonresident defendant.

(a) If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such nonresid ıt defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for 3 consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

(b) The Court may make all necessary rules respecting the form of process, the manner of issuance and return thereof, the release of such property from seizure and for

the sale of the property so seized, and may require the plaintiff to give approved security to abide any order of the Court respecting the property.

(c) Any transfer or assignment of the property so seized after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized and sold and such sale and confirmation shall transfer to the purchaser all the right, title and interest of the defendant in and to the property as fully as if the defendant had transferred the same to the purchaser in accordance with law. (Code 1852, § 1938; 17 Del. Laws, c. 215; Code 1915, § 3850; 34 Del. Laws, c. 216, § 2; 35 Del. Laws, c. 217; 36 Del. Laws, c. 268, § 1; Code 1935, § 4374; 10 Del. C. 1953, § 366; 50 Del. Laws, c. 379, § 1.)

Supreme Court, U. S.
FILED
NOV 17 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1976.

No. 75-1812

R. F. SHAFFER, et al.,

Appellants,

v.

ARNOLD HEITNER, as Custodian for
MARK ANDREW HEITNER,

Appellee.

On Appeal From the Supreme Court of the
State of Delaware.

JURISDICTIONAL STATEMENT FILED JUNE 15, 1976.
PROBABLE JURISDICTION NOTED OCTOBER 4, 1976.

TABLE OF CONTENTS.

	Page
Relevant Docket Entries	A1
Complaint (Doc. 1)	A4
Motion for Order of Sequestration (Doc. 4)	A18
Order of Sequestration (Doc. 5)	A19
Sequestrator's Bond (Doc. 7)	A32
Plaintiff's Bond (Doc. 8)	A34
Motion to Quash Service of Process, To Vacate Order of Sequestration, and To Dismiss (Doc. 16)	A37
Answer of Defendants—The Greyhound Corporation and Greyhound Lines, Inc. (Doc. 17)	A39
Notice, Motion, Order for Leave to Amend Complaint, etc., Alias Order of Sequestration, Affidavit of Howard Handelman (All Three Orders Granted August 28, 1974) (Doc. 23)	A44
Plaintiff's Bond (Doc. 26)	A62
Sequestrator's Bond (Doc. 27)	A65
Answer of Defendants The Greyhound Corp. and Greyhound Lines, Inc, to the Amended Complaint (Doc. 28)	A67
Motion to Quash Service of Process, to Vacate Alias Order of Sequestration and to Dismiss (Doc. 30—Exhibits A and B Omitted)	A68
Stipulation and Order Signed by V. C. Brown on September 13, 1974 (Doc. 31)	A70
Letter Opinion to Counsel From V. C. Brown, dated May 12, 1975 (Doc. 40)	A73
Notice of Appeal (Doc. 42)	A94
Opinion of the Supreme Court of Delaware, dated April 15, 1976 (Del. Supreme Court Doc. 20)	A97
Notice of Appeal to Supreme Court of the United States (Del. Supreme Court Doc. 22)	A119

IN THE
COURT OF CHANCERY OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 4514

ARNOLD HEITNER, as Custodian for
MARK ANDREW HEITNER,

Plaintiff,

v.

THE GREYHOUND CORPORATION, et al.,

Defendants.

RELEVANT DOCKET ENTRIES

1. May 22, 1974 Complaint for an Order of Sequestration—Filed

• • •

4. May 22, 1974 Motion for Order of Sequestration—Filed

5. May 22, 1974 Signed Order of Sequestration by C. Quillen on 5-22-74 Appointing Stanley C. Macel, Esq. as Sequestrator—Filed

• • •

7. May 22, 1974 Sequestrator's Bond—Filed

8. May 23, 1974 Plaintiff's Bond—Filed

9. June 7, 1974 Sequestrator's Report, Petition for Allowance and Order Thereon signed by C. Quillen on 6-7-74

• • •

16. July 30, 1974 Notice, Motion to Quash Service of Process, To Vacate Order Sequestration, and To Dismiss—Filed

17. July 31, 1974 Answer of Defendants—The Greyhound Corporation and Greyhound Lines, Inc.—Filed

18. July 31, 1974 Motion to Vacate Order of Sequestration and to Dismiss—Filed

• • •

23. Aug. 22, 1974 Notice, Motion, Proposed Order for Leave to Amend Complaint. Proposed Alias Order of Sequestration, Affidavit—Filed

    Hearing Held Before V. C. Brown on 8-28-74 on 1. Motion to Amend Complaint 2. Motion to Vacate Sequestration 3. Alias Order of Sequestration. Decision: All Three Granted

• • •

29. Sept. 9, 1974 Motion to Vacate Order of Sequestration and to Dismiss—Filed

30. Sept. 10, 1974 Notice, Motion to Quash Service of Process, To Vacate Alias Order of Sequestration and To Dismiss—Filed

31. Sept. 13, 1974 Stipulation and Order signed by V. C. Brown on 9-13-74 for Brief Schedule: Def. Opening Brief Already Filed Plt. Answering Brief Due 10-24-74 Def. Reply Brief Due 11-19-74 Arg. 11-26-74 at 11:00

• • •

40. May 14, 1975 Letter of Opinion to Counsel from V. C. Brown dated 5-12-75 that Motions to Quash and Vacate the Order of Sequestration and in

the case of individual defendants to Dismiss the Complaint are Denied; It Is So Ordered—Filed

• • •

42. June 6, 1975 Notice of Appeal—Filed

• • •

SUPREME COURT OF THE STATE OF DELAWARE

20. April 20, 1975 Opinion of The Supreme Court of Delaware, dated April 15, 1976

• • •

22. May 7, 1975 Notice of Appeal to Supreme Court of the United States

IN THE
COURT OF CHANCERY OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 4514

ARNOLD HEITNER, as custodian for
MARK ANDREW HEITNER,

Plaintiff,

-against-

THE GREYHOUND CORPORATION, GREYHOUND LINES, INC., R. F. SHAFFER, J. L. KERRIGAN, F. L. NAGEOTTE, GERALD H. TRAUTMAN, BART COOK, R. N. DICK, WILLIAM E. HASTINGS, F. W. ACHERMAN, WILLIAM R. ADAMS, HOWARD BOYD, ESTATE OF FREDERICK L. EHRMAN, PAUL E. HOOVER, H. A. MONTAGUE, CHARLES S. MUNSON, RANKIN M. SMITH, HANS STAUFFER, HAROLD C. STUART, JAMES W. WALKER, LESLIE B. WORTHINGTON, WILLIAM WOOD PRINCE, MILTON STEINBACK, JESS NICKS, RALPH C. BATASTINI, ROBERT MINGE BROWN, DAVID L. DUENSING, CHARLES R. OREM, CLIFTON B. COX and M. J. O'ROURKE,

Defendants.

COMPLAINT

Plaintiff, for his complaint against the defendants, alleges upon information and belief, except as to Paragraph "1" hereof, which he alleges on knowledge.

AS AND FOR A FIRST CAUSE OF ACTION

1. (a) Plaintiff is a stockholder of the defendant, THE GREYHOUND CORPORATION (herein called the "Parent Corporation").

(b) Plaintiff was a stockholder of the Parent Corporation at the time of the transactions, wrongs and damages complained of herein. Reference is made herein to dates preceding plaintiff's stock ownership for the purpose of affording historical background and of establishing a continuous course of conduct.

(c) Plaintiff brings this action derivatively in the right and for the benefit of the Parent Corporation and representatively on behalf of and for the benefit of all of its stockholders who are similarly situated, and also on behalf of and in the right of GREYHOUND LINES, INC. (hereinafter the "Subsidiary Corporation").

2. (a) The Parent Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Phoenix, Arizona.

(b) The Subsidiary Corporation is a corporation organized and existing under the laws of the State of California, with its principal place of business in Phoenix, Arizona. It is a wholly owned subsidiary of THE GREYHOUND CORPORATION (Parent Corporation).

(c) The Parent Corporation and the Subsidiary Corporation are the largest common carriers of passengers by motor vehicle in the United States, authorized to operate throughout most of the country.

(d) Whenever used herein "Greyhound" shall mean the Parent Corporation and the Subsidiary Corporation (The Greyhound Corporation and Greyhound Lines, Inc.).

3. The individual defendants, except F. L. Nageotte, Bart Cook, R. N. Dick, William E. Hastings and M. J. O'Rourke, were and are officers and directors of the Parent Corporation during the periods below:

R. F. Shaffer	1966–Present
J. L. Kerrigan	1971–Present
Gerald H. Trautman	1965–Present
F. W. Acherman	1957–1971
William R. Adams	1962–Present
Howard Boyd	1967–Present
Frederick L. Ehrman	1965–1974
Paul E. Hoover	1962–1970
H. A. Montague	1966–1971
Charles S. Munson	1956–Present
Rankin M. Smith	1967–Present
Hans Stauffer	1957–Present
Harold C. Stuart	1959–Present
James W. Walker	1962–Present
Leslie B. Worthington	1966–Present
William Wood Prince	1969–1970
Milton Steinback	1969–1971
Jess Nicks	1969–Present
Ralph C. Batastini	1971–Present
Robert Minge Brown	1971–Present
David L. Duensing	1970–Present
Charles R. Orem	1970–1971
Clifton B. Cox	1971–Present

4. The defendant, R. F. SHAFFER (hereinafter called "Shaffer") is President of the Parent Corporation. The defendant, J. L. KERRIGAN (hereinafter called "Kerrigan") is President of the Subsidiary Corporation. The defendant, F. L. NAGEOTTE (hereinafter called "Nageotte") is President of Greyhound Lines–West, an operating division of the Subsidiary Corporation, with its principal place of business in San Francisco, California. The defendant, BART COOK (hereinafter called "Cook") is the Vice President of Traffic for Greyhound Lines–West. The defendant R. N. DICK (hereinafter called "Dick") is the Vice President of Transportation for Greyhound Lines–West. The defendant M. J. O'ROURKE (hereinafter called "O'Rourke") is the Vice President of Traffic for Greyhound Lines–East, and the defendant, WILLIAM E. HASTINGS (hereinafter called "Hastings") is the Staff Vice President of the Subsidiary Corporation. The defendants, SHAFFER, KERRIGAN, NAGEOTTE and COOK are, and at all pertinent times herein mentioned have been, actively engaged in the management, direction and control of Greyhound's affairs and were the officers of Greyhound who are responsible for the illegal acts hereinafter alleged.

5. On May 27, 1969, Greyhound filed in the United States District Court, for the Northern District of Illinois, (hereinafter called the "District Court"), an action bearing Civil Action No. 69-C-1148, appealing a cease and desist order of the Interstate Commerce Commission. The Interstate Commerce Commission and the United States of America filed a counterclaim, praying an injunction be granted against Greyhound that they cease from certain enumerated practices against Mount Hood Stages, Inc. (hereinafter called "Mt. Hood") and directing Greyhound to restore practices and traffic patterns which existed between Greyhound and Mt. Hood, or were in contemplation, as of July 30, 1952. Three interested parties, Mt. Hood, National Trailways Bus System and the Public Utilities Commission of Oregon were permitted to intervene.

6. On February 5, 1970, the District Court entered a decision on the merits and an order which denied Greyhound's motion to set aside the order of the Interstate Commerce Commission and affirmed the Commission's prior order. The Court further ordered that the counterclaim of the United States and the Interstate Commerce Commission be granted as follows:

> "It is ordered that Greyhound Lines, Inc. and Greyhound Corporation restore practices and traffic

patterns in existence or in contemplation as of July 30, 1952, in particular:

(1) that Greyhound show Mt. Hood schedules in Greyhound folders on an equal basis with other non-Greyhound lines;

(2) that Greyhound restore the through bus service which Greyhound operated until September 8, 1964, in connection with Mt. Hood via Klamath Falls and Biggs (The Dalles), Oregon, and discontinue the bus service Greyhound has operated in substitution therefor since then via Portland, Oregon;

(3) that Greyhound revise its interline schedules in connection with Mt. Hood so as to eliminate the presently existing delay of approximately three hours for passengers seeking to travel between California and Spokane via Mt. Hood's route and to negotiate in good faith with Mt. Hood on the establishment of bus schedules most advantageous to the traveling public;

(4) that Greyhound voluntarily and accurately quote joint through routes in connection with Mt. Hood, without geographical limitations in a manner fully responsive to inquiries from the traveling public;

(5) that Greyhound cease and desist from quoting Mt. Hood's service unfavorably or inaccurately in response to inquiries from the traveling public and from not quoting Mt. Hood's service at all in response to specific requests from the traveling public;

(6) that Greyhound show Mt. Hood's connecting routes on its maps on an equal basis with other non-Greyhound carriers;

(7) that Greyhound permit Mt. Hood's representatives to call on Greyhound's agents;

(8) that Greyhound establish joint through fares with Mt. Hood;

(9) that Greyhound cease and desist from discriminating against Mt. Hood at depots that Hood occupies with Greyhound; and

(10) that Greyhound cease and desist from influencing Commission agents selling both Greyhound and Mt. Hood tickets to favor Greyhound".

7. The defendants, SHAFFER, KERRIGAN and NAGEOTTE, with knowledge of the District Court order of February 5, 1970, willfully violated its above provisions, in that they failed to embark upon a program of compliance that would meet the requirements of the order; failed to take any steps toward compliance with some paragraphs of that order; purported to interpret the order in such a way as to render it meaningless and acted under twisted interpretations of parts of the Court's order.

8. As a result of the foregoing, Greyhound was caused to violate the provisions of the District Court order of February 5, 1970.

9. On June 22, 1971, the United States of America and Interstate Commerce Commission filed criminal and civil contempt of Court proceedings for failure to comply with the District Court order of February 5, 1970. The civil contempt petition named as respondents, The Greyhound Corporation, Greyhound Lines, Inc., R. F. Shaffer, J. L. Kerrigan and F. L. Nageotte. The criminal contempt petition was directed at the Greyhound Corporation and Greyhound Lines, Inc. The two petitions were consolidated for all purposes in accordance with a pre-trial order of March 8, 1972.

10. On June 22, 1973, the United States District Court, Northern District of Illinois (District Court) issued its

memorandum and order finding Greyhound guilty of criminal contempt for violation of Paragraphs 1, 3, 4, 5 and 6 of the order set forth in Paragraph 6 above. The Court also found Greyhound, and the defendants SHAFFER, KERRIGAN and NAGEOTTE in civil contempt for continuing violations of Paragraphs 3, 4 and 5 of said order. Thereafter in its memorandum and order on issue of sanctions for criminal and civil contempt, dated January 22, 1974, a fine of $100,000 was imposed upon the Parent Corporation and a fine of $500,000 was imposed upon the Subsidiary Corporation.

11. In or about 1968, a civil proceeding was commenced in the United States District Court, Oregon District, under Civil action No. 668-374 in an action entitled Mt. Hood Stages, Inc. v. The Greyhound Corp., et al., charging violations of the antitrust laws by acts of Greyhound. Said action was tried in 1973 and the jury found Greyhound guilty of three violations of the antitrust laws. The Court entered a judgment in Mt. Hood's favor in the sum of $13,146,090 and for its reasonable attorneys fees. Greyhound's motion for a new trial and a judgment notwithstanding the verdict were denied by the Court on November 29, 1973.

12. The entry of the order of February 5, 1970 referred to in Paragraph 6 above, and the institution of the civil antitrust action referred to in Paragraph 11 above, required the individual defendants so to conduct the affairs of Greyhound as to minimize the risk of further antitrust violations and damages resulting therefrom, and to eliminate the risk of contempt sanctions including fines for violation of Court orders.

13. Notwithstanding this duty to the corporations and their stockholders, the individual defendants (a) during the period commencing approximately 1964 to 1973 either entered into, engaged in or participated in or authorized, approved, ratified or acquiesced in, the aforesaid plan and conspiracy under which Greyhound, eliminated competition and restrained trade in violation of the antitrust laws; (b) during the period February 5, 1970 to January 22, 1974, engaged in a course of conduct which evidenced a willful failure and contemptuous refusal to commence compliance with the order of February 5, 1970 and generally failed to fulfill its obligations to the Court in a timely and expeditious manner.

14. As a result of the foregoing, Greyhound has already sustained substantial losses and will sustain additional losses hereafter as follows:

a) Greyhound has spent and will be obligated to spend in the future large sums for legal fees and expenses in connection with the aforesaid civil and criminal proceedings;

b) Greyhound has paid and/or will be required to pay substantial sums of money by way of fines for criminal contempt of Court, including $100,000 imposed upon the Parent Corporation and $500,000 imposed upon the Subsidiary Corporation;

c) Greyhound has paid and/or will be required to pay substantial sums of money by way of multiple damages for violation of the antitrust laws and in defense of same;

d) Greyhound has expended large sums for public relations and advertising in order to enhance and promote the good will of the company, the value of which has been wasted, impaired and destroyed by the unfavorable publicity given to Greyhound in connection with its antitrust violations and contempt of Court;

e) Greyhound has been compelled to pay for the time of executives and other employees of the Corporation taken up in conducting said illegal course of conduct and in defending against the aforementioned contempt proceedings and the aforementioned antitrust action.

15. By reason of the aforesaid, Greyhound has already sustained substantial losses and will sustain additional losses hereafter. The amount of monies already expended by Greyhound on account of the improper and illegal acts described above is unknown and can only be ascertained upon an accounting.

16. Each of the individual defendants engaged in or acquiesced in the transactions referred to above and acted recklessly, negligently and in disregard of his obligations as director or officer of Greyhound.

17. Plaintiff has made no demand upon the individual defendants as directors of Greyhound to take action with respect to the wrongs herein complained of because all of them have either participated in, authorized or approved the transactions complained of herein and have taken no steps to prevent any of such actions or to seek redress therefor although such defendants have had knowledge thereof. The individual defendants who comprise the membership of the Board of Directors of Greyhound are themselves defendants in this action and they would not and could not diligently prosecute this action because they would have had to bring it against themselves.

18. Plaintiff has no adequate remedy at law.

AS AND FOR A SECOND CAUSE OF ACTION

19. Plaintiff repeats and realleges all of the allegations contained in Paragraphs "1" through "18" hereof.

20. A Deferred Compensation Plan of Greyhound has been in effect since at least April 1, 1971. The Plan provides for the issuance of stock unit credits to participants. The persons eligible to participate in the Plan are those employees who are mainly responsible for management operations.

21. During the years 1971 to 1973, at least $7,500,000, was paid to executives of Greyhound including some executives who are individual defendants herein and were and still are also directors of Greyhound.

22. At all of the times aforementioned, the individual defendants of Greyhound knew about or participated in causing Greyhound to engage in the aforesaid contempt of Court and violations of the antitrust laws of the United States. In fixing the amounts to be credited to the various participants of the Deferred Compensation Plan, said defendants failed to establish a separate and adequate reserve to provide for the large expenses, fines and damages which have resulted, might result in the future, and could have been reasonably anticipated to result from the wrongs aforementioned.

23. At all of the times aforementioned, the amounts appropriated to the Deferred Compensation Plan and the amounts paid or credited as deferred compensation to the directors, officers and employees of Greyhound were excessive, unlawful, improvident and wasteful resulting in large damages to Greyhound and its stockholders.

24. As a result of the foregoing, the amounts appropriated, credited or disbursed pursuant to the Deferred Compensation Plan were improper and excessive and constituted a gift and waste of the assets of Greyhound.

25. As a result of the foregoing, the directors, officers and employees who share in the Deferred Compensation Plan were unjustly enriched to the loss and detriment of

Greyhound and its shareholders and should be required to account therefor.

26. As a result of the foregoing, the continued payments of deferred compensation to the directors, officers and employees are illegal and unlawful and will result in an irreparable injury to Greyhound unless they are enjoined.

AS AND FOR A THIRD CAUSE OF ACTION

27. Plaintiff repeats and realleges all of the allegations contained in Paragraphs "1" through "18" and "20" through "26" hereof.

28. Pursuant to a Stock Option Plan approved by the stockholders of Greyhound, options to purchase shares of the stock of Greyhound have been granted from time to time to various officers and directors, including some officers who are individual defendants herein and are directors of Greyhound.

29. Some of the individual defendants herein are among the officers and directors to whom said options to purchase shares of the stock of Greyhound have been granted but remain unexercised.

30. As a result of the aforesaid, the continued employment of the said persons by Greyhound would be improvident, improper, contrary to public morals and injurious to the interests of Greyhound and should be terminated forthwith for cause.

31. As a result of the aforesaid, the options of said individual defendants not heretofore exercised should be cancelled forthwith.

32. By reason of the foregoing, the continued granting of options to said individual defendants is illegal and unlawful and would result in irreparable injuries to Greyhound and should be enjoined.

WHEREFORE, plaintiff demands judgment as follows:

(a) That the individual defendants jointly and severally account to Greyhound for all losses, expenses and damages sustained by Greyhound and which will be sustained by Greyhound up to the time of trial by reason of the actions set forth in this complaint;

(b) That the individual defendants jointly and severally post security in such amount as the Court may require to indemnify Greyhound and save it harmless against any future losses, expenses and damages arising by reason of the actions set forth in this complaint;

(c) Terminating the options granted under the Stock Option Plan to the individual defendants who engaged in the wrongful actions complained of herein;

(d) Enjoining further payments to defendants herein under the Deferred Compensation Plan;

(e) Awarding plaintiff costs and disbursements of this action, including reasonable counsel fees;

(f) Granting plaintiffs such other, further and different relief as to the Court may deem just and proper in the premises.

BAYARD, BRILL & HANDELMAN, ESQS.
By /s/ HOWARD M. HANDELMAN
Howard M. Handelman, Esq.
Attorneys for Plaintiff
300 Market Tower
Wilmington, Delaware 19801

Of Counsel:
COWAN, LIEBOWITZ & LATMAN, P.C.
200 East 42nd Street
New York, New York 10017

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ARNOLD HEITNER, being duly sworn, deposes and says that he is the plaintiff in the within action, and that he has read the foregoing Complaint and knows the contents thereof; that the same is true to his own knowledge except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

/s/ ARNOLD HEITNER
Arnold Heitner

Sworn to and subscribed before me
the 16th day of May, 1974.

/s/ ROBERT SACK
Notary Public, State of New York
No. 31-8734660
Qualified in New York County
Term Expires March 30, 1976

Form 1

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

No. 53630

I, NORMAN GOODMAN, County Clerk and Clerk of the Supreme Court of the State of New York, in and for the County of New York, a Court of Record, having by law a seal,

DO HEREBY CERTIFY pursuant to the Executive Law of the State of New York, that Robert Sack whose name is subscribed to the annexed affidavit, deposition, certificate of acknowledgment or proof, was at the time of taking the same a NOTARY PUBLIC in and for the State of New York duly commissioned, sworn and qualified to act as such; that pursuant to law, a commission or a certificate of his official character, with his autograph signature has been filed in my office; that at the time of taking such proof, acknowledgment or oath, he was duly authorized to take the same; that I am well acquainted with the handwriting of such NOTARY PUBLIC or have compared the signature on the annexed instrument with his autograph signature deposited in my office, and I believe that such signature is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this May 17, 1974.

/s/ NORMAN GOODMAN
County Clerk and Clerk of the
Supreme Court, New York
County

Fee Paid $3.00

IN THE
COURT OF CHANCERY OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 4514

ARNOLD HEITNER, as custodian for
MARK ANDREW HEITNER,

Plaintiff,

v.

THE GREYHOUND CORPORATION, et al.,

Defendants.

MOTION FOR ORDER OF SEQUESTRATION

Plaintiff moves for an Order of Sequestration pursuant to 10 *Del. C.* §366 with respect to Defendants R. F. Shaffer, J. L. Kerrigan, F. L. Nageotte, Gerald H. Trautman, Bart Cook, R. N. Dick, William E. Hastings, F. W. Acherman, William R. Adams, Howard Boyd, Estate of Frederick L. Ehrman, Paul E. Hoover, H. A. Montague, Charles S. Munson, Rankin M. Smith, Hans Stauffer, Harold C. Stuart, James W. Walker, Leslie B. Worthington, William Wood Prince, Milton Steinback, Jess Nicks, Ralph C. Batastini, Robert Minge Brown, David L. Duensing, Charles R. Orem, Clifton B. Cox and M. J. O'Rourke, who are non residents of the State of Delaware as more fully appears in the Complaint filed in this action and in the affidavit of Howard M. Handelman, Esquire attached hereto.

By /s/ HOWARD M. HANDELMAN
Howard M. Handelman
300 Market Tower
Wilmington, Delaware 19801
Attorneys for Plaintiff

IN THE
COURT OF CHANCERY OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 4514

ARNOLD HEITNER, as custodian for
MARK ANDREW HEITNER,

Plaintiff,

v.

THE GREYHOUND CORPORATION, GREYHOUND LINES, INC., R. F. SHAFFER, J. L. KERRIGAN, F. L. NAGEOTTE, GERALD H. TRAUTMAN, BART COOK, R. N. DICK, WILLIAM E. HASTINGS, F. W. ACHERMAN, WILLIAM R. ADAMS, HOWARD BOYD, ESTATE OF FREDERICK L. EHRMAN, PAUL E. HOOVER, H. A. MONTAGUE, CHARLES S. MUNSON, RANKIN M. SMITH, HANS STAUFFER, HAROLD C. STUART, JAMES W. WALKER, LESLIE B. WORTHINGTON, WILLIAM WOOD PRINCE, MILTON STEINBACK, JESS NICKS, RALPH C. BATASTINI, ROBERT MINGE BROWN, DAVID L. DUENSING, CHARLES R. OREM, CLIFTON B. COX and M. J. O'ROURKE,

Defendants.

SEQUESTRATION ORDER

This 22nd day of May, 1974, it appearing that R. F. SHAFFER, J. L. KERRIGAN, F. L. NAGEOTTE, GERALD H. TRAUTMAN, BART COOK, R. N. DICK, WILLIAM E. HASTINGS, F. W. ACHERMAN, WILLIAM R. ADAMS, HOWARD BOYD, ESTATE OF FREDERICK L. EHRMAN, PAUL E. HOOVER, H. A. MON-

TAGUE, CHARLES S. MUNSON, RANKIN M. SMITH, HANS STAUFFER, HAROLD C. STUART, JAMES W. WALKER, LESLIE B. WORTHINGTON, WILLIAM WOOD PRINCE, MILTON STEINBACK, JESS NICKS, RALPH C. BATASTINI, ROBERT MINGE BROWN, DAVID L. DUENSING, CHARLES R. OREM, CLIFTON B. COX and M. J. O'ROURKE are non residents of the State of Delaware having property in the State of Delaware.

It is, upon motion of HOWARD M. HANDELMAN, ESQUIRE, attorney for the Plaintiff, ordered as follows:

1. The Defendants named in the preceding paragraph shall appear in this Court and answer the complaint on or before the 1st day of July, 1974 and a summons shall issue directing them to appear on said date. On or before the 27th day of May, 1974, the Register shall send by certified mail to each of said Defendants at his address as set forth in the Affidavit of Howard M. Handelman, a copy of the summons, of the complaint and of this Order. The Register shall cause a copy of this order to be published in a newspaper published in the City of Wilmington, New Castle County, State of Delaware, once a week for three consecutive weeks, commencing the week following the entry of this Order.

2. Stanley C. Macel, of the City of Wilmington, State of Delaware, is hereby appointed Sequestrator to seize and hold pursuant to the succeeding terms of this Order, property of the Defendants in the State of Delaware, consisting of common stock, 3% Second Cumulative Preference Stock, stock unit credits, of the Greyhound Corporation and all options and all warrants to purchase the common or preferred stock of said corporation issued to the Defendants and all contractual obligations, rights, debts or credits due or accrued to or for the benefit of any of said Defendants under any type of written instrument, contract or other

legal instrument of any kind whatever between any of the Defendants and said corporation (hereinafter "property").

3. The Sequestrator shall have power to seize the aforesaid property standing in the name of said Defendants, or in or which they may have or hold any right, title or interest, legal or equitable, with all the rights belonging or appertaining to the aforesaid property, including any and all dividends or interest payments which may be due or payable with respect to said property. The property may be sold under an Order of this Court to pay the demand of the Plaintiff in this cause if any of the aforesaid named Defendants do not appear or do otherwise default; and, subject to the provisions of paragraph 4 hereof, said property shall remain subject to such seizure and may be sold to satisfy any decree made in this cause unless security sufficient to this Court shall be given to secure the release thereof.

4. In the event that the Defendants or any one of them shall make a bona fide sale or sales of any of the aforesaid property seized hereunder, and shall receive therefor not less than the market price at the time of sale and shall deposit with the Sequestrator the proceeds of such sale or sales, the Sequestrator shall forthwith advise the Greyhound Corporation of such facts and thereupon the property sequestered and seized and so sold shall be released from such sequestration and seizure without further action of any kind by the Sequestrator or this Court; and in such event, the proceeds of any such sale shall be held by the Sequestrator until further order of this Court in lieu of the property initially seized and so sold; provided, further, that the proceeds of any such sale or sales shall be subject to investment and reinvestment, by the Sequestrator in such property and upon such terms and conditions as the De-

fendants may from time to time direct in writing, provided always that the property in which such proceeds are invested and reinvested (as well as any uninvested proceeds of any sale of such property) shall be held by and in the name of the Sequestrator, pursuant to the terms of this Order and until further Order of this Court.

In the event that said Greyhound Corporation shall desire to make any payments under any agreement, contract or other legal instrument of any kind whatsoever between any of said Defendants and said corporation being seized under this Order by the Sequestrator, any such obligations, rights, debts or credits may be discharged by the payment of the sums due from said corporation, as may be appropriate, to the Sequestrator and said corporation, as may be appropriate, may receive a full and complete discharge of said contractual obligations, rights, debts or credits from each or any of said Defendants, and the Sequestrator hereinbefore appointed; and in such event, the proceeds of the payment of any of the aforesaid contractual obligations, rights, debts or credits shall be held by the Sequestrator until the further order of this Court in lieu of the contractual obligations, rights, debts or credits initially seized and so paid or discharged, provided further that the proceeds of any such payment or payments shall be subject to investment and reinvestment by the Sequestrator upon such terms and conditions as each or any of said Defendants may from time to time direct in writing; provided always that the property in which such proceeds are invested and reinvested (as well as any uninvested proceeds of any such payment) shall be held by and in the Sequestrator, pursuant to the terms of this Order and until the further Order of this Court.

5. The Sequestrator shall forthwith serve upon the Greyhound Corporation a certified copy of this Order and

demand that said corporation shall (a) deliver to him within ten (10) days after such service a statement of the number of shares of stock, options and warrants held or owned or standing in the name of each of said Defendants, or in or to which all or any of said Defendants have any right, title or interest, legal or equitable, with the number or numbers of the certificate or certificates or note or notes or other marks distinguishing the same and the dates the same were issued, and all rights of any kind thereon belonging or appertaining; (b) deliver to him within ten (10) days after such service a statement of the number of options and warrants to purchase shares of the common and preferred capital stock held by each of said Defendants and the mark or symbol used to identify any written evidence of such options or warrants; (c) cause entries to be made on the books of the Greyhound Corporation showing that the securities held or owned or standing in the name of said Defendants or held beneficially for them and the rights or interest therein are held by such Sequestrator; (d) cause entries to be made on the proper records of such Greyhound Corporation showing that all said options and warrants to purchase shares of stock in said corporation are held by such Sequestrator; (e) demand that said Greyhound Corporation shall not until further Order of this Court pay any or all the contractual obligations, rights, debts or credits due under any type of agreement, contract or other legal instrument of any kind whatever between any of said Defendants and said corporation except as hereinbefore provided in paragraph 4 and that none of the said Defendants shall receive any such payment, except in conformity with the further Order of this Court; (f) in general and subject to the provisions of paragraph 4 hereof, do all acts necessary to hold and preserve the said securities, options and warrants and said contractual obligations, rights, debts or credits until further Order of this Court.

6. The Sequestrator shall qualify by filing in this Court a bond in the sum of One Thousand Dollars ($1,000.00) with National Surety Corporation, an Illinois corporation as surety, which bond need only be executed by the surety. The condition of said bond shall be that the Sequestrator shall well and truly perform the duties of this office and shall duly account for all property which may come into his hands as such Sequestrator.

7. Plaintiff shall file in this Court a bond in the sum of One Thousand Dollars ($1,000) with National Surety Corp. an Illinois corporation as surety which bond need only be executed by the surety. The condition of said bond shall be that the Plaintiff shall abide with any Order of the Court respecting the property herein ordered to be seized and sequestered.

/s/ WILLIAM T. QUILLEN,
Chancellor.

IN THE
COURT OF CHANCERY OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No.

ARNOLD HEITNER, as custodian for
MARK ANDREW HEITNER,

Plaintiff,

against

THE GREYHOUND CORPORATION, GREYHOUND LINES, INC., R. F. SHAFFER, J. L. KERRIGAN, F. L. NAGEOTTE, GERALD H. TRAUTMAN, BART COOK, R. N. DICK, WILLIAM E. HASTINGS, F. W. ACHERMAN, WILLIAM R. ADAMS, HOWARD BOYD, ESTATE OF FREDERICK L. EHRMAN, PAUL E. HOOVER, H. A. MONTAGUE, CHARLES S. MUNSON, RANKIN M. SMITH, HANS STAUFFER, HAROLD C. STUART, JAMES W. WALKER, LESLIE B. WORTHINGTON, WILLIAM WOOD PRINCE, MILTON STEINBACK, JESS NICKS, RALPH C. BATASTINI, ROBERT MINGE BROWN, DAVID L. DUENSING, CHARLES R. OREM, CLIFTON B. COX and M. J. O'ROURKE.

Defendants.

AFFIDAVIT PURSUANT TO RULES 4(da) and 4(db)

HOWARD M. HANDELMAN, being duly sworn, deposes and says:

1. I am a member of the Bar of the State of Delaware and a member of the firm of *Bayard, Brill and Handelman,* attorneys for plaintiff in this action.

2. This affidavit is filed in support of plaintiff's motion for an order of sequestration pursuant to 10 Del. C. §366.

3. The individual defendants named in this action are non-residents of the State of Delaware whose last known post office addresses are as follows:

Name	*Address*
R. F. Shaffer	c/o The Greyhound Corporation 111 West Clarendon Phoenix, Arizona
J. L. Kerrigan	c/o The Greyhound Lines, Inc. 371 Market Street San Francisco, California
F. L. Nageotte	c/o Greyhound Lines-West 371 Market Street San Francisco, California
Gerald H. Trautman	c/o The Greyhound Corporation 111 West Clarendon Phoenix, Arizona
Bart Cook	c/o Greyhound Lines-West 371 Market Street San Francisco, California
R. N. Dick	c/o Greyhound Lines-West 371 Market Street San Francisco, California

Name	*Address*
William E. Hastings	c/o Greyhound Lines, Inc. 371 Market Street San Francisco, California
F. W. Acherman	c/o The Greyhound Corporation 111 West Clarendon Phoenix, Arizona
William R. Adams	c/o St. Regis Paper Company 150 East 42nd Street New York, New York 10017
Howard Boyd	c/o El Paso Natural Gas Company El Paso Natural Gas Building El Paso, Texas
Estate of Frederick L. Ehrman	480 Park Avenue New York, New York
Paul E. Hoover	c/o Crocker Citizens National Bank 611 West Sixth Street Los Angeles, California
H. A. Montague	c/o Greyhound Food Management 2928 Osborn Road Phoenix, Arizona
Charles S. Munson	893 Sasco Hill Road Southport, Connecticut
Rankin M. Smith	c/o Life Insurance Company of Georgia 600 West Peachtree Street Atlanta, Georgia

Name	*Address*
Hans Stauffer	c/o Stauffer Chemical Company Nyala Farm Road Westport, Connecticut
Harold C. Stuart	c/o Doerner, Stuart, Saunders, Daniel & Langenkamp 1200 Atlas Life Building Tulsa, Oklahoma 74103
James W. Walker	c/o Brody Security & Realty Corp. The address of this company is unknown and cannot with due diligence be ascertained
Leslie B. Worthington	c/o United States Steel Corp. 600 Grant Street Pittsburgh, Penna. 15230
William Wood Prince	c/o Armour & Company 111 West Clarendon Phoenix, Arizona
Milton Steinback	c/o Wertheim & Company 1 Chase Manhattan Plaza New York, New York
Jess Nicks	c/o Armour & Company 111 West Clarendon Phoenix, Arizona
Ralph C. Batastini	c/o The Greyhound Corporation 111 West Clarendon Phoenix, Arizona

Name	*Address*
Robert Minge Brown	c/o McCutchen, Doyle, Brown & Enersen 601 California Street San Francisco, Calif. 94108
David L. Duensing	c/o Armour-Dial, Inc. 179 Entin Road Clifton, New Jersey
Charles R. Orem	c/o Armour & Company 111 West Clarendon Phoenix, Arizona
Clifton B. Cox	c/o Armour Food Company 111 West Clarendon Phoenix, Arizona
M. J. O'Rourke	Greyhound Lines-East 371 Market Street San Francisco, California

4. The property to be sequestered consists in each instance of common stock, 3% Second Cumulative Preferenced Stock and stock unit credits of the Defendant Greyhound Corporation, a Delaware corporation, as well as all options and all warrants to purchase said stock issued to said individual Defendants and all contractural obligations, all rights, debts or credits due or accrued to or for the benefit of any of the said Defendants under any type of written agreement, contract or other legal instrument of any kind whatever between any of the individual Defendants and said corporation.

5. The closing price of the common stock of THE GREYHOUND CORPORATION reported in the Wall

Street Journal dated April 22, 1974 as of April 21, 1974 was $15.25 per share.

6. Upon information and belief, based upon information contained in a proxy statement of the Greyhound Corporation dated April 5, 1974, which purported to disclose beneficial ownership of the common stock of the Greyhound Corporation as of February 21, 1974, the following named Defendants are owners of stock of the Greyhound Corporation as set forth opposite their respective names:

Name	*Common Stock Beneficially Owned as of 2/21/74*
R. F. Shaffer	12,650
J. L. Kerrigan	1,215
Gerald H. Trautman	10,471*
William R. Adams	920
Howard Boyd	1,000
Frederick L. Ehrman (Deceased)	10,000
Charles S. Munson	6,300
Rankin M. Smith	550
Hans Stauffer	3,018
Harold C. Stuart	7,500
James W. Walker	1,000
Leslie B. Worthington	500
Jess Nicks	600
Ralph C. Batastini	5,902
Robert Minge Brown	2,000
David L. Duensing	17,577**
Clifton B. Cox	20,550

* As well as 1,350 warrants to purchase 1 share each of common stock.

** As well as $80,000 principal amount of 6½% conv. sub. deb. due 1990.

7. Upon information and belief, the remaining defendants whose names are set forth in Paragraph 3 hereof are owners of securities of The Greyhound Corporation, the exact amount of which cannot be determined at this time.

8. The interest and value of the remaining property to be sequestered pursuant to Paragraph 4 of this Affidavit is presently unascertainable as it is only within the knowledge of the defendants.

9. The sources of information contained in this Affidavit are the Corporation Division of the Office of the Secretary of State of Delaware, the proxy statement of The Greyhound Corporated dated April 5, 1974 and the Wall Street Journal dated April 22, 1974.

/s/ HOWARD M. HANDELMAN
Howard M. Handelman, Esq.

Sworn to and subscribed before
me the 22nd day of May, 1974.

/s/ (Illegible)
Notary Public.

IN THE
COURT OF CHANCERY OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 4514

ARNOLD HEITNER, as Custodian
for MARK ANDREW HEITNER,

Plaintiff,

v.

THE GREYHOUND CORPORATION,

Defendants.

et al.,

SEQUESTRATOR'S BOND

KNOW ALL MEN BY THESE PRESENTS THAT Stanley C. Macel, III of the County of New Castle and State of Delaware and National Surety Corporation, an Illinois corporation, are held and firmly bound unto the State of Delaware in the sum of One Thousand Dollars ($1,000), lawful money of the United States of America, to be paid to the State of Delaware to which payment well and truly to be made it does bind itself, its successors and assigns, firmly by these presents.

SEALED with its seal and dated this 23rd day of May, 1974.

WHEREAS, the said Stanley C. Macel, III has been appointed Sequestrator of and for all the shares of common

and preferred stock and all options and all warrants to purchase the common or preferred stock and all contractual obligations, rights, debts and credits of The Greyhound Corporation standing in the name of the non-resident defendants, on in or to which they may have or hold any right, title or interest, legal or equitable, with all the rights belonging or appertaining thereto as by reference to the order entered in the captioned action on May 22, 1974 will more fully appear; and

WHEREAS, the said Stanley C. Macel, III has been directed to file and enter a bond conditioned that he shall well and truly perform the duties of this office and shall duly act for all property which may come into his hands as such Sequestrator;

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS such that if the above bounded Stanley C. Macel, III shall well and truly perform the duties of his said office, shall abide by and perform any order of this Court respecting the said property, and shall truly act for all property which may come into his hands as such Sequestrator, then this obligation to be void; otherwise, to be and remain in full force and effect.

/s/ STANLEY C. MACEL, III
SEQUESTRATOR

NATIONAL SURETY CORPORATION
By JOHN E. NAYMAN
Attorney-in-fact

Signed, Sealed and
Delivered in the
Presence of:

/s/ PATRICIA E. ABANO

IN THE
COURT OF CHANCERY OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 4514

ARNOLD HEITNER, as Custodian
for MARK ANDREW HEITNER,

Plaintiff,

v.

THE GREYHOUND CORPORATION,
et al.,

Defendants.

PLAINTIFF'S BOND

KNOW ALL MEN BY THESE PRESENTS that National Surety Corporation, an Illinois corporation, is held and firmly bound unto the State of Delaware in the sum of One Thousand Dollars ($1,000), lawful money of the United States of America, to be paid to the State of Delaware, to which payment well and truly to be made the said National Surety Corporation binds itself, its successors and assigns firmly by these presents.

SEALED with the seal of the said National Surety Corporation and dated this day of May, 1974.

WHEREAS, Arnold Heitner has filed in the Court of Chancery of the State of Delaware, in and for New Castle

County, a certain complaint against The Greyhound Corporation, et al.; and

WHEREAS, by an order which was made and entered in the captioned action on May 22, 1974 the Court authorized and directed the seizure and sequestration of all of the shares of common or preferred stock and all options and warrants to purchase stock of The Greyhound Corporation, standing in the name of the non-resident defendants, together with all contractual obligations, rights, debts or credits due or accrued to the benefit of any of the non-resident defendants under any type written agreement, contract or other legal instrument between any of said defendants and said corporation owned by the non-resident defendants herein and all of their right, title and interest, legal or equitable, therein; and

WHEREAS, said order contains the following provision:

> "7. Plaintiff shall file in this Court a bond in the sum of One Thousand Dollars ($1,000) with National Surety Corporation, an Illinois corporation, as surety, which bond need only be executed by the surety. The condition of this bond shall be that plaintiff shall abide with any order of the Court respecting the property herein ordered to be seized and sequestered."

NOW, the condition of this obligation is such that if the said Arnold Heitner shall well and truly indemnify and save harmless the said defendants from the loss or damage, if any, up to but not in excess of One Thousand Dollars ($1,000) which the Court of Chancery of the State of Delaware, in and for New Castle County, finds that they may have sustained by reason of the seizure and retention of property by the Sequestrator, pursuant to said order, then

this obligation to be void; otherwise, to be and remain in full force and effect.

NATIONAL SURETY CORPORATION

By
Attorney-in-fact

Signed, Sealed and
Delivered in the
Presence of:

IN THE
COURT OF CHANCERY OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 4514

ARNOLD HEITNER, as custodian
for MARK ANDREW HEITNER,
Plaintiff,

v.

THE GREYHOUND CORPORATION,
et al.,
Defendants.

MOTION TO QUASH SERVICE OF PROCESS, TO VACATE ORDER OF SEQUESTRATION, AND TO DISMISS

NOW COME defendants R. F. Shaffer, J. L. Kerrigan, F. L. Nageotte, Gerald H. Trautman, Bart Cook, R. N. Dick, William E. Hastings, Howard Boyd, H. A. Montague, Rankin M. Smith, Hans Stauffer, Harold C. Stuart, James W. Walker, Leslie B. Worthington, Jess Nicks, Ralph C. Batastini, Robert Minge Brown, David L. Duensing, Charles R. Orem, Clifton B. Cox, and M. H. O'Rourke (hereinafter the "Moving Defendants"), appearing specially by their attorneys and not intending to submit to the jurisdiction of this Court, and move for an order to quash service of process and sequestration of their property, to vacate the purported order of sequestration entered by this Court on May 22, 1974, and to dismiss this action as to the Moving Defendants for lack of jurisdiction, on the following grounds:

A. The purported order of sequestration entered on May 22, 1974, and the statute and Court rules upon which it is based, constitute a denial of due process of law, in violation of Article I, Section 7, of the Constitution of 1897 of the State of Delaware and of the Fourteenth Amendment to the United States Constitution.

B. The property of the Moving Defendants allegedly sequestered pursuant to the purported order of sequestration entered on May 22, 1974, is not capable of seizure in the State of Delaware.

C. Service, by sequestration or otherwise, attempted to be made upon said Moving Defendants is of no force and effect since such service is constitutionally void, and therefore proceedings taken under color of this Court's order of May 22, 1974, must be vacated and quashed, and this action dismissed as to the Moving Defendants inasmuch as jurisdiction over the Moving Defendants cannot be obtained in the State of Delaware.

/s/ E. N. CARPENTER, II
E. N. Carpenter, II
/s/ R. FRANKLIN BALOTTI
R. Franklin Balotti
Richards, Layton & Finger
4072 DuPont Building
Wilmington, DE 19801
Attorneys for Moving Defendants
R. F. Shaffer, J. L. Kerrigan, F. L. Nageotte, Gerald H. Trautman, Bart Cook, R. N. Dick, William E. Hastings, Howard Boyd, H. A. Montague, Rankin M. Smith, Hans Stauffer, Harold C. Stuart, James W. Walker, Leslie B. Worthington, Jess Nicks, Ralph C. Batastini, Robert Minge Brown, David L. Duensing, Charles R. Orem, Clifton B. Cox, and M. H. O'Rourke, Appearing Specially

Dated: July 30, 1974

IN THE
COURT OF CHANCERY OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 4514

ARNOLD HEITNER, as custodian
for MARK ANDREW HEITNER,
Plaintiff,

v.

THE GREYHOUND CORPORATION,
et al.,
Defendants.

ANSWER OF DEFENDANTS THE GREYHOUND CORPORATION AND GREYHOUND LINES, INC.

FIRST DEFENSE

The complaint, and each separate cause of action thereof, fails to state a claim on which relief can be granted insofar as it alleges acts and conduct preceding the date on which plaintiff acquired his share of stock of The Greyhound Corporation ("Greyhound").

SECOND DEFENSE

First Cause of Action

1. Defendants are without knowledge or information sufficient to form a belief as to the allegations of paragraph 1 of the complaint, except that defendants admit that plain-

tiff is registered on the books of Greyhound as the owner of one share of stock of Greyhound.

2. Defendants admit the allegations of paragraph 2 of the complaint, except that defendants deny that Greyhound is a common carrier.

3. Defendants admit the allegations of paragraph 3 of the complaint.

4. Defendants admit the allegations of paragraph 4 of the complaint, except that they deny that R. N. Dick is the vice president of transportation for Greyhound Lines-West, that William E. Hastings is the staff vice president of Greyhound Lines, Inc., and that the defendants Shaffer, Kerrigan, Nageotte and Cook were the officers of Greyhound who were responsible for the acts alleged in the complaint.

5. Defendants deny the allegations of paragraph 5 of the complaint, except that they admit that on May 27, 1969, defendants filed an action in the United States District Court for the Northern District of Illinois, numbered 69-C-1148, against the United States and the Interstate Commerce Commission, and that the United States and the Interstate Commerce Commission filed a counterclaim for an injunction against plaintiffs in such action.

6. Defendants admit the allegations of paragraph 6 of the complaint.

7. Defendants deny the allegations of paragraph 7 of the complaint.

8. Defendants deny the allegations of paragraph 8 of the complaint.

9. Defendants admit the allegations of paragraph 9 of the complaint.

10. Defendants admit the allegations of paragraph 10 of the complaint and allege that portions of such order are presently on appeal to the United States Court of Appeals for the Seventh Circuit.

11. Defendants admit the allegations of paragraph 11 of the complaint and allege that said judgment is presently on appeal to the United States Court of Appeals for the Ninth Circuit.

12. Defendants deny the allegations of paragraph 12 of the complaint.

13. Defendants deny the allegations of paragraph 13 of the complaint.

14. Defendants deny the allegations of paragraph 14 of the complaint.

15. Defendants deny the allegations of paragraph 15 of the complaint.

16. Defendants deny the allegations of paragraph 16 of the complaint.

17. Defendants deny the allegations of paragraph 17 of the complaint.

18. Defendants deny the allegation of paragraph 18 of the complaint.

Second Cause of Action

19. Defendants incorporate their answers to paragraphs 1 through 18, inclusive, of the complaint.

20. Defendants admit the allegations of paragraph 20 of the complaint.

21. Defendants admit the allegations of paragraph 21 of the complaint.

22. Defendants deny the allegations of paragraph 22 of the complaint.

23. Defendants deny the allegations of paragraph 23 of the complaint.

24. Defendants deny the allegations of paragraph 24 of the complaint.

25. Defendants deny the allegations of paragraph 25 of the complaint.

26. Defendants deny the allegations of paragraph 26 of the complaint.

Third Cause of Action

27. Defendants incorporate their answers to paragraphs 1 through 18, inclusive, and 20 through 26, inclusive, of the complaint.

28. Defendants admit the allegations of paragraph 28 of the complaint.

29. Defendants admit the allegations of paragraph 29 of the complaint.

30. Defendants deny the allegations of paragraph 30 of the complaint.

31. Defendants deny the allegations of paragraph 31 of the complaint.

32. Defendants deny the allegations of paragraph 32 of the complaint.

WHEREFORE, defendants pray that the complaint be dismissed and that they be awarded their costs and such other relief as may be just.

POTTER ANDERSON & CORROON
By /s/ RICHARD F. CORROON
350 Delaware Trust Building
Wilmington, Delaware 19801
Attorneys for defendants
The Greyhound Corporation
and Greyhound Lines, Inc.

July 30, 1974.

IN THE
COURT OF CHANCERY OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 4514

ARNOLD HEITNER, as custodian for
MARK ANDREW HEITNER,
Plaintiff,

v.

THE GREYHOUND CORPORATION, et al.,
Defendants.

NOTICE OF MOTION

TO: E. N. Carpenter, II
R. Franklin Balotti
Richards, Layton and Finger
Du Pont Building
Wilmington, Delaware
Richard F. Corroon
Potter, Anderson & Corroon
Delaware Trust Building
Wilmington, Delaware

Please take notice that the attached motion will be presented to the Court on August 28, 1974, at 10:00 a.m.

BAYARD, BRILL & HANDELMAN
By /s/ HOWARD M. HANDELMAN
HOWARD M. HANDELMAN
300 Market Tower
Wilmington, Delaware
Attorneys for Plaintiff

IN THE
COURT OF CHANCERY OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 4514

ARNOLD HEITNER, as custodian for
MARK ANDREW HEITNER,
Plaintiff,

v.

THE GREYHOUND CORPORATION, et al.,
Defendants.

MOTION

The plaintiff hereby moves as follows:

1. That the Court enter an order granting leave to the plaintiff to amend his Complaint by adding the following language as a new subparagraph (e) of Paragraph 2:

> 2(e) Each of the individual defendants is a non-resident of the State of Delaware.

2. Upon the entry of the order by the Court granting leave to the plaintiff to amend his Complaint as aforesaid, that the Court enter an Alias Order of Sequestration with respect to defendants R. F. Shaffer, J. L. Kerrigan, F. L. Nageotte, Gerald H. Trautman, Bart Cook, R. N. Dick, William E. Hastings, F. W. Acherman, William R. Adams, Howard Boyd, Estate of Frederick L. Ehrman, Paul E. Hoover, H. A. Montague, Charles S. Munson, Rankin M. Smith, Hans Stauffer, Harold C. Stuart, James W. Walker, Leslie B. Worthington, William Wood Prince, Milton Steinback, Jess Nicks, Ralph C. Batastini, Robert Minge Brown, David L. Duensing, Charles R. Orem, Clifton B. Cox and

M. J. O'Rourke, who are non-residents of the State of Delaware as appears in the Amended Complaint.

3. Upon the entry of the Alias Order of Sequestration as aforesaid, that the Court enter an order vacating the Sequestration Order dated May 22, 1974.

The reason for the foregoing motion is that the specially appearing individual defendants have moved, *inter alia*, to vacate the orginal Order of Sequestration on the ground that in the original Complaint there is no allegation of the non-residency of the individual defendants whose property interests were seized pursuant to the original Order of Sequestration.

BAYARD, BRILL & HANDELMAN

By /s/ HOWARD M. HANDELMAN
HOWARD M. HANDELMAN
300 Market Tower
Wilmington, Delaware
Attorneys for Plaintiff

IN THE
COURT OF CHANCERY OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 4514

ARNOLD HEITNER, as custodian for
MARK ANDREW HEITNER,
Plaintiff,

v.

THE GREYHOUND CORPORATION, et al.,
Defendants.

ORDER

AND NOW TO WIT this 28th day of August, 1974, the plaintiff having come before this Court and moved for leave to amend his Complaint, and for the issuance of an Alias Order of Sequestration and the vacation of the Sequestration Order dated May 22, 1974,

IT IS ORDERED that:

1. a) The plaintiff is hereby granted leave to amend his Complaint by adding the following language as a new subparagraph (e) of paragraph 2:

> 2. (e) Each of the individual defendants is a non-resident of the State of Delaware.

b) That defendant Greyhound Corporation and defendant Greyhound Lines, Inc. shall have 20 days from the date hereof to answer or otherwise plead to the Amended Complaint;

c) Service on the non-resident individual defendants shall be in accord with the Alias Order of Sequestration which shall be entered.

2. a) Upon the entry of the Alias Order of Sequestration, the Sequestration Order dated May 22, 1974 shall be vacated without further order of this Court.

b) The Sequestrator appointed herein is directed to notify The Greyhound Corporation through its registered agent in Delaware that all shares of stock in said corporation and all other property, property rights and contractual rights and interests of said individual defendants heretofore seized pursuant to the Order of Sequestration entered herein have been released and discharged from such seizure and sequestration, and that said Order of Sequestration has been vacated.

c) Stanley C. Macel, III, Esquire, the Sequestrator appointed herein, is hereby released from any further duties under the Order of Sequestration entered herein and dated May 22, 1974, and he need not file any report to this Court pertaining to such sequestration. Said Sequestrator is hereby allowed the sum of $100.00 for his services as Sequestrator to be paid within five days from the date of this Order by the Register in Chancery from funds deposited by the Plaintiff for this purpose, but reserving to the Court the right hereafter to tax the amount of said allowance as part of the costs of this action and to direct by whom shall be made, by way of reimbursement or otherwise.

d) The Sequestrator and the Plaintiff and the surety on their bonds be and they are hereby discharged from the obligations on the bonds heretofore entered herein by them.

/s/ Grover C. Brown
Vice Chancellor

IN THE
COURT OF CHANCERY OF THE
STATE OF DELAWARE
In and for New Castle County

Civil Action No. 4514

ARNOLD HEITNER, as custodian for
MARK ANDREW HEITNER,
Plaintiff,

v.

THE GREYHOUND CORPORATION, et al.,
Defendants.

ALIAS ORDER OF SEQUESTRATION

This 28th day of August, 1974, it appearing from the Amended Complaint that R. F. SHAFFER, J. L. KERRIGAN, F. L. NAGEOTTE, GERALD H. TRAUTMAN, BART COOK, R. N. DICK, WILLIAM E. HASTINGS, F. W. ACHERMAN, WILLIAM R. ADAMS, HOWARD BOYD, ESTATE OF FREDERICK L. EHRMAN, PAUL E. HOOVER, H. A. MONTAGUE, CHARLES S. MUNSON, RANKIN M. SMITH, HANS STAUFFER, HAROLD C. STUART, JAMES W. WALKER, LESLIE B. WORTHINGTON, WILLIAM WOOD PRINCE, MILTON STEINBACK, JESS NICKS, RALPH C. BATASTINI, ROBERT MINGE BROWN, DAVID L. DUENSING, CHARLES R. OREM, CLIFTON B. COX and M. J. O'ROURKE are non-residents of the State of Delaware having property in the State of Delaware.

It is, upon motion of HOWARD M. HANDELMAN, ESQUIRE, attorney for the plaintiff, ordered as follows:

1. The defendants named in the preceding paragraph shall appear in this Court and answer the Complaint on or

before the 11 day of October, 1974 and a summons shall be issued directing them to appear on said date. On or before the 6 day of September, 1974, the Register shall send by certified mail to each of said defendants at his address as set forth in the Affidavit of Howard M. Handelman, executed on the 22nd day of August, 1974, a copy of the summons, of the Complaint and of this Order. The Register shall cause a copy of this Order to be published in a newspaper published in the City of Wilmington, New Castle County, State of Delaware, once a week for three consecutive weeks, commencing the week following the entry of this Order.

2. Stanley C. Macel, III, Esquire, of the City of Wilmington, State of Delaware, is hereby appointed Sequestrator to seize and hold pursuant to the succeeding terms of this Order, property of the defendants in the State of Delaware, consisting of common stock, 3% Second Cumulative Preference Stock, stock unit credits, of the Greyhound Corporation and all options and all warrants to purchase the common or preferred stock of said corporation issued to the defendants and all contractual obligations, rights, debts or credits due or accrued to or for the benefit of any of said defendants under any type of written instrument, contract or other legal instrument of any kind whatever between any of the defendants and said corporation (hereinafter "property").

3. The Sequestrator shall have power to seize the aforesaid property standing in the name of said defendants, or in or which they may have or hold any right, title or interest, legal or equitable, with all the rights belonging or appertaining to the aforesaid property, including any and all dividends or interest payments which may be due or payable with respect to said property. The property may be

sold under an Order of this Court to pay the demand of the plaintiff in this cause if any of the aforesaid named defendants do not appear or do otherwise default; and, subject to the provisions of paragraph 4 hereof, said property shall remain subject to such seizure and may be sold to satisfy any decree made in this cause unless security sufficient to this Court shall be given to secure the release thereof.

4. In the event that the defendants or any one of them shall make a bona fide sale or sales of any of the aforesaid property seized hereunder, and shall receive therefor not less than the market price at the time of sale and shall deposit with the Sequestrator the proceeds of such sale or sales, the Sequestrator shall forthwith advise the Greyhound Corporation of such facts and thereupon the property sequestered and seized and so sold shall be released from such sequestration and seizure without further action of any kind by the Sequestrator or this Court; and in such event, the proceeds of any such sale shall be held by the Sequestrator until further order of this Court in lieu of the property initially seized and so sold; provided, further, that the proceeds of any such sale or sales shall be subject to investment and reinvestment by the Sequestrator in such property and upon such terms and conditions as the defendants may from time to time direct in writing, provided always that the property in which such proceeds are invested and reinvested (as well as any uninvested proceeds of any sale of such property) shall be held by and in the name of the Sequestrator, pursuant to the terms of this Order and until further Order of this Court.

In the event that said Greyhound Corporation shall desire to make any payments under any agreement, contract or other legal instrument of any kind whatsoever between any of said defendants and said corporation being

seized under this Order by the Sequestrator, any such obligations, rights, debts or credits may be discharged by the payment of the sums due from said corporation, as may be appropriate, to the Sequestrator and said corporation, as may be appropriate, may receive a full and complete discharge of said contractual obligations, rights, debts or credits from each or any of said defendants, and the Sequestrator hereinbefore appointed; and in such event, the proceeds of the payment of any of the aforesaid contractual obligations, rights debts or credits shall be held by the Sequestrator until the further order of this Court in lieu of the contractual obligations, rights, debts, or credits initially seized and so paid or discharged, provided further that the proceeds of any such payment or payments shall be subject to investment and reinvestment by the Sequestrator upon such terms and conditions as each or any of said defendants may from time to time direct in writing; provided always that the property in which such proceeds are invested and reinvested (as well as any uninvested proceeds of any such payment) shall be held by and in the Sequestrator, pursuant to the terms of this Order and until the further Order of this Court.

5. The Sequestrator shall forthwith serve upon the Greyhound Corporation a certified copy of this Order and demand that said corporation shall (a) deliver to him within ten (10) days after such service a statement of the number of shares of stock, options and warrants held or owned or standing in the names of each of said defendants, or in or to which all or any of said defendants have any right, title or interest, legal or equitable, with the number or numbers of the certificate or certificates or note or notes or other marks distinguishing the same and the dates the same were issued, and all rights of any kind thereon belonging or appertaining; (b) deliver to him within ten (10)

days after such service a statement of the number of options and warrants to purchase shares of the common and perferred capital stock held by each of said defendants and the mark or symbol used to identify any written evidence of such options or warrants; (c) cause entries to be made on the books of the Greyhound Corporation showing that the securities held or owned or standing in the name of said defendants or held beneficially for them and the rights or interest therein are held by such Sequestrator; (d) cause entries to be made on the proper records of such Greyhound Corporation showing that all said options and warrants to purchase shares of stock in said corporation are held by such Sequestrator; (e) demand that said Greyhound Corporation shall not until further Order of this Court pay any or all of the contractual obligations, rights, debts or credits due under any type of agreement, contract or other legal instrument of any kind whatever between any of said defendants and said corporation except as hereinbefore provided in paragraph 4 and that none of the said defendants shall receive any such payment, except in conformity with the further Order of this Court; (f) in general and subject to the provisions of paragraph 4 hereof, do all acts necessary to hold and perserve the said securities, options and warrants and said contractual obligations, rights, debts or credits until further Order of this Court.

6. The Sequestrator shall qualify by filing in this Court a bond in the sum of One Thousand Dollars ($1,000.00) with National Surety Corporation, an Illinois corporation as surety, which bond need only be executed by the surety. The condition of said bond shall be that the Sequestrator shall well and truly perform the duties of this office and shall duly account for all property which may come into his hands as such Sequestrator.

7. Plaintiff shall file in this Court a bond in the sum of One Thousand Dollars ($1,000.00) with National Surety Corporation, an Illinois corporation as surety which bond need only be executed by the surety. The condition of said bond shall be that the plaintiff shall abide with any Order of the Court respecting the property herein ordered to be seized and sequestered.

/s/ GROVER C. BROWN
Vice Chancellor

IN THE
COURT OF CHANCERY OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 4514

ARNOLD HEITNER, as custodian for
MARK ANDREW HEITNER,
Plaintiff,

v.

THE GREYHOUND CORPORATION, et al.,
Defendants.

AFFIDAVIT OF HOWARD M. HANDLEMAN

HOWARD M. HANDELMAN, being duly sworn, deposes and says:

1. I am a member of the Bar of the State of Delaware and a member of the firm of BAYARD, BRILL & HANDELMAN, attorneys for plaintiff in this action.

2. This affidavit is filed in support of plaintiff's motion for an alias order of sqeuestration pursuant to 10 Del. C. §366.

3. The individual defendants named in this action are non-residents of the State of Delaware whose last known post office addresses are as follows:

Name	*Address*
R. F. Shaffer	c/o The Greyhound Corporation 111 West Clarendon Phoenix, Arizona

Name	*Address*
J. L. Kerrigan	c/o The Greyhound Lines, Inc. 371 Market Street San Francisco, California
F. L. Nageotte	c/o Greyhound Lines—West 371 Market Street San Francisco, California
Gerald H. Trautman	c/o The Greyhound Corporation 111 West Clarendon Phoenix, Arizona
Bart Cook	c/o Greyhound Lines—West 371 Market Street San Francisco, California
R. N. Dick	c/o Greyhound Lines—West 371 Market Street San Francisco, California
William E. Hastings	c/o Greyhound Lines, Inc. 371 Market Street San Francisco, California
F. W. Acherman	c/o The Greyhound Corporation 111 West Clarendon Phoenix, Arizona
William R. Adams	c/o St. Regis Paper Company 150 East 42nd Street New York, New York 10017
Howard Boyd	c/o El Paso Natural Gas Company El Paso Natural Gas Building El Paso, Texas

Name	*Address*
Estate of Frederick L. Ehrman	480 Park Avenue New York, New York
Paul E. Hoover	c/o Crocker Citizens National Bank 611 West Sixth Street Los Angeles, California
H. A. Montague	c/o Greyhound Food Management 2928 Osborn Road Phoenix, Arizona
Charles S. Munson	893 Sasco Hill Road Southport, Connecticut
Rankin M. Smith	c/o Life Insurance Company of Georgia 600 West Peachtree Street Atlanta, Georgia
Hans Stauffer	c/o Stauffer Chemical Company Nyala Farm Road Westport, Connecticut
Harold C. Stuart	c/o Doerner, Stuart, Saunders, Daniel & Langenkamp 1200 Atlas Life Building Tulsa, Oklahoma 74103
James W. Walker	c/o Brody Security & Realty Corp. The address of this company is unknown and cannot with due diligence be ascertained

Name	*Address*
Leslie B. Worthington	c/o United States Steel Corp. 600 Grant Street Pittsburgh, Pennsylvania 15230
William Wood Prince	c/o Armour & Company 111 West Clarendon Phoenix, Arizona
Milton Steinback	c/o Wertheim & Company 1 Chase Manhattan Plaza New York, New York
Jess Nicks	c/o Armour & Company 111 West Clarendon Phoenix, Ariozna
Ralph C. Batastini	c/o The Greyhound Corporation 111 West Clarendon Phoenix, Arizona
Robert Minge Brown	c/o McCutchen, Doyle, Brown & Enersen 601 California Street San Francisco, Calif. 94103
David L. Duensing	c/o Armour-Dial, Inc. 179 Entin Road Clifton, New Jersey
Charles R. Orem	c/o Armour & Company 111 West Clarendon Phoenix, Arizona

Name	*Address*
Clifton B. Cox	c/o Armour Food Company 111 West Clarendon Phoenix, Arizona
M. J. O'Rourke	Greyhound Lines–East 371 Market Street San Francisco, California

4. The property to be sequestered consists in each instance of common stock, 3% Second Cumulative Preferenced Stock and stock unit credits of the defendant Greyhound Corporation, a Delaware corporation, as well as all options and all warrants to purchase said stock issued to said individual defendants and all contractural obligations, all rights, debts or credits due or accrued to or for the benefit of any of the said defendants under any type of written agreement, contract or other legal instrument of any kind whatever between any of the individual defendants and said corporation.

5. The closing price of the common stock of the Greyhound Corporation reported in the Wall Street Journal dated August 21, 1974 as of August 20, 1974 was $11.75 per share.

6. Upon information and belief, based upon information contained in a proxy statement of the Greyhound Corporation dated April 5, 1974, which purported to disclose beneficial ownership of the common stock of the Greyhound Corporation as of February 21, 1974, the following named defendants are owners of stock of the Greyhound Corporation as set forth opposite their respective names:

Name	*Common Stock Beneficially Owned as of 2/21/74*
R. F. Shaffer	12,650
J. L. Kerrigan	1,215
Gerald H. Trautman	10,471°
William R. Adams	920
Howard Boyd	1,000
Frederick L. Ehrman (Deceased)	10,000
Charles S. Munson	6,300
Rankin M. Smith	550
Hans Stauffer	3,018
Harold C. Stuart	7,500
James W. Walker	1,000
Leslie B. Worthington	500
Jess Nicks	600
Ralph C. Batastini	5,902
Robert Minge Brown	2,000
David L. Duensing	17,577°°
Clifton B. Cox	20,550

° As well as 1,350 warrants to purchase 1 share of each of common stock.

°° As well as $80,000 principal amount of 6½% conv. sub. deb. due 1990.

7. Upon information and belief, based upon information contained in RESPONSE TO NOTICE OF SEQUESTRATION OF THE GREYHOUND CORPORATION executed on May 31, 1974, attached hereto as Exhibit "A", and SUPPLEMENTAL RESPONSE TO NOTICE OF SEQUESTRATION OF THE GREYHOUND CORPORATION, executed on June 28, 1974, attached hereto as Exhibit "B", the defendants named therein are owners of common stock, warrants, stock options, stock unit credits, debentures and employment contracts, as more particularly described in Exhibits "A" and "B".

8. Upon information and belief, the remaining defendants whose names are set forth in Paragraph 3 hereof are owners of securities of The Greyhound Corporation, the exact amount of which cannot be determined at this time.

9. The interest and value of the remaining property to be sequestered pursuant to Paragraph 4 of this Affidavit is present unascertainable as it is only within the knowledge of the defendant.

10. The sources of information contained in this Affidavit are the Corporation Division of the Office of the Secretary of State of Delaware, the proxy statement of The Greyhound Corporation dated April 5, 1974, the Wall Street Journal dated August 21, 1974, the RESPONSE TO NOTICE OF SEQUESTRATION OF THE GREYHOUND CORPORATION, executed on May 31, 1974 and the SUPPLEMENTAL RESPONSE TO NOTICE OF SEQUESTRATION OF THE GREYHOUND CORPORATION, executed on June 28, 1974.

/s/ HOWARD M. HANDELMAN
Howard M. Handelman

Sworn to and Subscribed before
me the 22 day of August, 1974.

/s/ (Illegible)
Notary Public

IN THE
COURT OF CHANCERY OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 4514

ARNOLD HEITNER, as custodian
for MARK ANDREW HEITNER,

Plaintiff,

v.

THE GREYHOUND CORPORATION,
et al.,

Defendants.

PLAINTIFF'S BOND

KNOW ALL MEN BY THESE PRESENTS that National Surety Corporation, an Illinois Corporation, is held and firmly bound unto the State of Delaware in the sum of One Thousand Dollars ($1,000), lawful money of the United States of America, to be paid to the State of Delaware, to which payment well and truly to be made the said National Surety Corporation binds itself, its successors and assigns firmly by these presents.

SEALED with the seal of the said National Surety Corporation and dated this 28th day of August, 1974.

WHEREAS, Arnold Heitner has filed in the Court of Chancery of the State of Delaware, in and for New Castle County, a certain complaint against The Greyhound Corporation, et al; and

WHEREAS, by an order which was made and entered in the captioned action on August 28, 1974 the Court authorized and directed the seizure and sequestration of all of the shares of common or preferred stock and all options and warrants to purchase stock of The Greyhound Corporation, standing in the name of the non-resident defendants, together with all contractual obligations, rights, debts or credits due or accrued to the benefit of any of the non-resident defendants under any type written agreement, contract or other legal instrument between any of said defendants and said corporation owned by the non-resident defendants herein and all of their right, title and interest, legal or equitable, therein, and

WHEREAS, said order contains the following provision:

> "7. Plaintiff shall file in this Court a bond in the sum of One Thousand Dollars ($1,000) with National Surety Corporation, an Illinois corporation, as surety, which bond need only be executed by the surety. The condition of this bond shall be that plaintiff shall abide with any order of the Court respecting the property herein ordered to be seized and sequestered."

NOW, the condition of this obligation is such that if the said Arnold Heitner shall well and truly indemnify and save harmless the said defendants from the loss or damage, if any, up to but not in excess of One Thousand Dollars ($1,000) which the Court of Chancery of the State of Delaware, in and for New Castle County, finds that they may have sustained by reason of the seizure and retention of property by the Sequestrator, pursuant to said order, then

this obligation to be void; otherwise, to be and remain in full force and effect.

NATIONAL SURETY CORPORATION

By /s/ EDWARD B. CARTER
Attorney-in-fact

Signed, Sealed and
Delivered in the
Presence of:

/s/ (Illegible)

IN THE
COURT OF CHANCERY OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 4514

ARNOLD HEITNER, as custodian
for MARK ANDREW HEITNER,

Plaintiff,

v.

THE GREYHOUND CORPORATION,
et al.,

Defendants.

SEQUESTRATOR'S BOND

KNOW ALL MEN BY THESE PRESENTS THAT Stanley C. Macel, III of the County of New Castle and State of Delaware and National Surety Corporation, an Illinois corporation, are held and firmly bound unto the State of Delaware in the sum of One Thousand Dollars ($1,000), lawful money of the United States of America, to be paid to the State of Delaware to which payment well and truly to be made it does bind itself, its successors and assigns, firmly by these presents.

SEALED with its seal and dated this 28th day of August, 1974.

WHEREAS, the said Stanley C. Macel, III has been appointed Sequestrator of and for all the shares of common and preferred stock and all options and all warrants to purchase the common or preferred stock and all contractual

obligations, rights, debts and credits of The Greyhound Corporation standing in the name of the non-resident defendants, on in or to which they may have or hold any right, title or interest, legal or equitable, with all the rights belonging or appertaining thereto as by reference to the order entered in the captioned action on August 28, 1974 will more fully appear; and

WHEREAS, the said Stanley C. Macel, III has been directed to file and enter a bond conditioned that he shall well and truly perform the duties of this office and shall duly act for all property which may come into his hands as such Sequestrator;

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that if the above bounded Stanley C. Macel, III shall well and truly perform the duties of his said office, shall abide by and perform any order of this Court respecting the said property, and shall truly act for all property which may come into his hands as such Sequestrator, then this obligation to be void; otherwise, to be and remain in full force and effect.

/s/ STANLEY C. MACEL, III
SEQUESTRATOR

NATIONAL SURETY CORPORATION

By: EDWARD B. CARTER
Attorney-in-fact

Signed, Sealed and
Delivered in the
Presence of:

/s/ R. H. HERRMAN

IN THE
COURT OF CHANCERY OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 4514

ARNOLD HEITNER, as custodian
for MARK ANDREW HEITNER,

Plaintiff,

v.

THE GREYHOUND CORPORATION,
et al.,

Defendants.

**ANSWER OF DEFENDANTS
THE GREYHOUND CORPORATION
AND GREYHOUND LINES, INC.
TO THE AMENDMENT COMPLAINT**

1. Defendants admit the allegations of paragraph 2(e) of the amended complaint.

2. For further answer to the amended complaint, the defendants incorporate their answer to the original complaint as though set forth in full herein.

POTTER ANDERSON & CORROON

By /s/ RICHARD F. CORROON
350 Delaware Trust Building
Wilmington, Delaware 19801
Attorneys for Defendants
The Greyhound Corporation
and Greyhound Lines, Inc.

IN THE
COURT OF CHANCERY OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 4514

ARNOLD HEITNER, as custodian
for MARK ANDREW HEITNER,

Plaintiff,

vs.

THE GREYHOUND CORPORATION,
et al.,

Defendants.

MOTION TO QUASH SERVICE OF PROCESS, TO VACATE ALIAS ORDER OF SEQUESTRATION, AND TO DISMISS

NOW COME defendants R. F. Shaffer, J. L. Kerrigan, F. L. Nageotte, Gerald H. Trautman, Bart Cook, R. N. Dick, William E. Hastings, Howard Boyd, H. A. Montague, Rankin M. Smith, Hans Stauffer, Harold C. Stuart, James W. Walker, Leslie B. Worthington, Jess Nicks, Ralph C. Batastini, Robert Minge Brown, David L. Duensing, Charles R. Orem, Clifton B. Cox, and M. H. O'Rourke (hereinafter the "Moving Defendants"), appearing specially by their attorneys and not intending to submit to the jurisdiction of this Court, and move for an order to quash service of process and sequestration of their property, to vacate the purported alias order of sequestration entered by this Court on August 28, 1974, and to dismiss this action as to the Moving Defendants for lack of jurisdiction, in the following grounds:

A. The purported alias order of sequestration entered on August 28, 1974, and the statute and Court rules upon

which it is based, constitute a denial of due process of law, in violation of Article I, Section 7, of the Constitution of 1897 of the State of Delaware and the Fourteenth Amendment to the United States Constitution.

B. The property of the Moving Defendants allegedly sequestered pursuant to the purported alias order of sequestration entered on August 28, 1974, is not capable of seizure in the State of Delaware.

C. Service, by sequestration or otherwise, attempted to be made upon said Moving Defendants is of no force and effect since such service is constitutionally void, and therefore proceedings taken under color of this Court's order of August 28, 1974, must be vacated and quashed, and this action dismissed as to the Moving Defendants inasmuch as jurisdiction over the Moving Defendants cannot be obtained in the State of Delaware.

/s/ E. N. CARPENTER, II
E. N. Carpenter, II

/s/ R. FRANKLIN BALOTTI
R. Franklin Balotti
Richards, Layton & Finger
4072 DuPont Building
Wilmington, DE 19801
Attorneys for Moving Defendants
R. F. Shaffer, J. L. Kerrigan, F. L. Nageotte, Gerald H. Trautman, Bart Cook, R. N. Dick, William E. Hastings, Howard Boyd, H. A. Montague, Rankin M. Smith, Hans Stauffer, Harold C. Stuart, James W. Walker, Leslie B. Worthington, Jess Nicks, Ralph C. Batastini, Robert Minge Brown, David L. Duensing, Charles R. Orem, Clifton B. Cox, and M. H. O'Rourke, Appearing Specially

Dated: September 10, 1974

IN THE
COURT OF CHANCERY OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 4514

ARNOLD HEITNER, as custodian
for MARK ANDREW HEITNER,

Plaintiff,

vs.

THE GREYHOUND CORPORATION,
et al.,

Defendants.

STIPULATION

WHEREAS, the Court entered an order of sequestration on May 22, 1974, and certain individual defendants, appearing specially, and the corporate defendants served and filed motions to quash service of process and to vacate said order of sequestration; and

WHEREAS, on August 28, 1974, the Court entered an alias order of sequestration, and certain individual defendants, appearing specially, and the corporate defendants have on September 9-10, 1974, filed motions to quash service of process and to vacate the alias order of sequestration entered by the Court on August 28, 1974; and

WHEREAS, the grounds for the motions of the defendants with respect to the original order of sequestration are substantially the same as those grounds submitted for the

motions of the defendants with respect to the alias order of sequestration; and

WHEREAS, the parties hereto had entered into a brief and argument schedule on the defendants' motions with respect to the original order of sequestration, pursuant to which the individual defendants, appearing specially, and the corporate defendants filed their opening brief on August 13, 1974;

IT IS THEREFORE STIPULATED AND AGREED this tenth day of September, 1974, subject to the approval of the Court, as follows:

1. The motion of the individual defendants, appearing specially, to quash service of process and to vacate the alias order of sequestration entered by the Court on August 28, 1974, and the motion of the corporate defendants with respect to said alias order of sequestration shall be briefed and argued as follows:

Defendants' opening brief	Already filed
Plaintiff's answering brief	October 24, 1974
Defendants' reply brief	November 19, 1974
Argument	November 26, 1974 at 11:00 a.m.

2. The opening brief of the defendants with respect to the original order of sequestration herein is hereby deemed to be the defendants' opening brief on their motions with respect to the alias order of sequestration, and the arguments made therein are hereby deemed to apply to the alias order of sequestration, with the plaintiff having the full opportunity to answer said arguments in his answering brief as though said arguments were made with respect to the

alias order of sequestration entered herein on August 28, 1974.

Howard M. Handelman

Richard K. Herrmann
Bayard, Brill & Handelman
300 Market Tower
Wilmington, DE 19801
Attorneys for Plaintiff
Richard F. Corroon
Potter Anderson & Corroon
350 Delaware Trust Building
Wilmington, DE 19801
Attorneys for Corporate Defendants
E. N. Carpenter, II
R. Franklin Balotti
Richards, Layton & Finger
4072 DuPont Building
Wilmington, DE 19801
Attorneys for Individual Defendants, Appearing Specially

SO ORDERED this 13th day of September, 1974.

/s/ Grover C. Brown
Vice Chancellor

LETTER OPINION

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

Grover C. Brown
Vice Chancellor

Court House
Georgetown, Delaware

May 12, 1975

Howard M. Handelman, Esquire
Bayard, Brill & Handelman
300 Market Tower
Wilmington, Delaware 19801

E. N. Carpenter, II, Esquire
Richards, Layton & Finger
4072 DuPont Building
Wilmington, Delaware 19801

Richard F. Corroon, Esquire
Potter, Anderson & Corroon
350 Delaware Trust Building
Wilmington, Delaware 19899

Re: Heitner v. The Greyhound Corporation, et al.
Civil Action No. 4514

Submitted: November 26, 1974

Gentlemen:

This is a stockholders derivative suit brought against and for the benefit of The Greyhound Corporation, a Delaware corporation, as well as against various nonresident officers and directors of Greyhound. The individual defendants have moved specially to quash and vacate the sequestration order which seeks to compel their appearance in this Court and to thus dismiss the complaint against them.

Greyhound has also moved to dismiss. I shall deal with their motions separately.

Because the plaintiff is also a nonresident and because the claims on which the complaint is premised allegedly involve wrongs to the corporation occurring outside this State, the individual defendants charge that the attempt to obtain personal jurisdiction over them through the Delaware sequestration statute constitutes an unconstitutional violation of due process. Defendants rest their position on three primary legal approaches, and, to a degree, the arguments tend to overlap each other. Because of this I feel it only fair to set forth what I perceive each separate thrust to be, with the expectation that if I have unfairly construed any one of them counsel will promptly advise.

The defendants concede that the sequestration statute, 10 *Del.C.* § 366, has been upheld against constitutional attack by the recent decision of this Court in *Gordon v. Michel*, Del.Ch., 297 A.2d 420(1972), and by our federal District Court in *U. S. Industries, Inc. v. Gregg*, D.Del., 348 F.Supp.1004(1972), and 58 F.R.D.469(1973). They suggest, however, that their particular arguments were not considered in *Gordon* and *Gregg* decisions misconstrue the operation of the sequestration statute and therefore should not be followed.

Pervading all of their arguments is the assumption that if the use of the sequestration process is upheld against them under the circumstances of this case, it would permit a nonresident plaintiff to compel the personal appearance of nonresident defendants in a Delaware court, (under the threat of a forfeiture of their property if they did not), by means of a prehearing seizure of property located outside this State based on a complaint which alleges wrongs also occurring outside of this State. This, the defendants say, can in no way be sanctioned as a proper use of service of

process in light of the decisions of the United States Supreme Court in *Sniadach v. Family Finance Corp.*, 395 U.S.337, 23 L.Ed.2d 349, 89 S.Ct.1820(1969), *Fuentes v. Shevin*, 407 U.S.67, 32 L.Ed.2d 556, 92 S.Ct. 1983(1972), *Mitchell v. W. T. Grant Co.*, U.S. , 40 L.Ed.2d 406, S.Ct. (1974), and their various precedential stepchildren. While the picture of the situation as painted by the defendants may evoke an initial wave of sympathy, I feel for reasons expressed hereafter that not all of the elements assumed by them are legally correct.

Also, in view of the recent wealth of judicial decision that has emerged from the swirling and infectious dust of *Sniadach* and *Fuentes*, I feel it appropriate to note a few distinctions at the outset. In the main those cases and their descendants dealt with suits between creditors and debtors wherein the ability of the plaintiff to obtain jurisdiction over the defendant was not in issue. In addition, while the terms "attachment" and "sequestration" stand for generally recognized legal concepts, their precise operational meaning in a given case may well depend on the purpose for which they are authorized by local statute or court rule. Compare, for instance, *Mitchell v. W. T. Grant Co., supra*, where in Louisiana "sequestration" was the process used for the prehearing seizure of specific property in which both the resident plaintiff and defendant claimed an ownership interest.

The primary purpose of "sequestration" as authorized by 10 *Del.C.* § 366 is not to secure possession of property pending a trial between resident debtors and creditors on the issue of who has the right to retain it. On the contrary, as here employed, "sequestration" is a process used to compel the personal appearance of a nonresident defendant to answer and defend a suit brought against him in a court of equity. *Sands v. Lefcourt Realty Corp.*, Del.Supr., 117

A.2d 365(1955). It is accomplished by the appointment of a sequestrator by this Court to seize and hold property of the nonresident located in this State subject to further Court order. If the defendant enters a general appearance, the sequestered property is routinely released, unless the plaintiff makes special application to continue its seizure, in which event the plaintiff has the burden of proof and persuasion. 10 *Del.C.* § 366; Rule 4(db); and see *Gordon v. Michel, supra,* footnote 1.

Here, what has been sequestered is stock held by the individual defendants in Greyhound, a Delaware corporation. Its purpose is to induce such officers and directors to appear and defend the suit brought against them for the benefit of the corporation. The complaint alleges wrongs to the corporation for which the plaintiff wants them held accountable. The ultimate relief sought is unliquidated damages to the corporation which the plaintiff has the burden to establish. Plaintiff does not want to hold their refrigerators or automobiles pending a hearing; he does not even want to hold their stock at this point. He simply wants it held by an officer appointed by the Court so as to entice them to appear, subject to the condition that if they refuse to appear, and if the Court should thereafter be convinced from the proof that they owe damages to the corporation, so much of their sequestered stock as necessary may be sold to satisfy the obligation. With this recitation as to the function of "sequestration" as applied to this case, I turn now to what I understand to be the arguments of the individual defendants.

I.

First the defendants argue that their Greyhound stock cannot be validly seized by the sequestration order since it is not property actually located in Delaware. They claim

that of the 52 jurisdictions that have adopted the Uniform Commercial Code, all but Delaware provide that no attachment of any security or share is valid until the security is actually seized. While acknowledging that 8 *Del.C.* § 169 provides that the "situs of the ownership" of all capital stock of a Delaware corporation is regarded as being in this State for purposes of "title, action, attachment, garnishment and jurisdiction of all courts held in this State," they argue that this is a pure fiction. They say that Delaware has no "control" over the property seized, i.e., the stock certificates, as required by the venerable decision of *Pennoyer v. Neff,* 95 U.S.714, 24 L.Ed.565(1878), but rather it only has control over the corporation that issued the stock. They say that control of the corporation gives no control over the transfer of its shares by shareholders such as the individual defendants. They point out that this was expressly recognized by this Court in *Haas v. Haas,* Del.Ch., 119 A.2d 358(1955). Finally, they theorize, since Delaware's Uniform Commercial Code recognizes that a bona fide purchaser without notice acquires a clear title to stock upon delivery of the certificate, as did *Haas v. Haas* under the previous Uniform Stock Transfer Act, there can be no valid seizure of corporate stock unless the certificates themselves are within this Court's jurisdiction.

The *Haas* case, on which defendants place great reliance, involved a suit by a wife against both her husband and General Motors Corporation to compel shares of stock then registered in the husband's name as a result of his fraudulent actions to be reregistered in the joint names of the husband and wife. Prior to this suit the husband had pledged the stock to a Florida bank as collateral for a loan on which he became in default. The court issued a restraining order against the husband and General Motors but, as it noted, it "did not then obtain actual control of the

certificates." 119 A.2d 360. Subsequent to the restraining order the husband directed the bank to sell the stock so as to pay off the loan, which the bank proceeded to do without knowledge of the Delaware Court proceedings which enjoined his right to transfer. General Motors refused to make the transfer because of the restraining order and the bank intervened as a defendant. Plaintiff sought to dismiss its petition for failure to state a claim, but this motion was denied by the Chancellor. He reasoned under the Uniform Stock Transfer Act (which was then in force) that where a transfer is made by a delivery of certificates and stock powers which are regular on their face, a purchaser without knowledge becomes a bona fide holder for value, and such status is not lost even though an action is pending and a restraining order against the transfer is outstanding. Thus he held that a claim had been stated.

From this the defendant would magically transform statutory rights which protect a bona fide purchaser for value under certain circumstances into the legal principle that the situs of the ownership interests in a Delaware corporation follow and depend upon the location of the stock certificate despite the language of 8 *Del.C.* § 169 to the contrary. I do not agree with this rationalization.

In adopting the Uniform Commercial Code, Delaware intentionally omitted the recommended language of the act which would have mandated the conclusion sought by the defendants. In addition, it was specifically provided that nothing in the Code should in any way affect the provisions of 8 *Del.C.* § 169 and 10 *Del.C.* § 366, among others. See 5A *Del.C.* § 8-317 and the comment thereto. This does not seem to be unreasonable. A shareholder owns a proportionate interest in his corporation which is represented by a stock certificate as well as being reflected on the corporate stock ledger.

Sequestration seeks to seize his ownership interest in the corporation, not merely his documentary indicia of ownership. Thus the fact that a shareholder has the right to transfer his ownership interest in the corporation to another by endorsement and delivery of the certificate offers no foundation for the proposition that the property interest represented by it departs this State's jurisdiction when the certificate crosses the border. Under this theory, a judgment debtor could avoid attachment of his auto, for instance, by simply mailing his title across the state line. Likewise, I presume, a stockholder who lost his certificate could not have his stock interest attached by any court, any where in the event he chose not to seek a new one.

Even in *Haas* it was noted that "for certain purposes such property [stock] has its situs in Delaware and the Uniform Stock Transfer Act does not alter this conclusion." 119 A.2d 362. See also *U.S. Industries, Inc. v. Gregg* at 348 F.Supp.1020 where it was observed that it is constitutionally proper for a state to provide "as Delaware has done," that the situs of the capital stock of its corporations is in the home state.

I cannot conclude that the sequestration of defendants' stock and stock interests is invalid here simply because the stock certificates themselves may be beyond the Court's jurisdiction.

II.

Secondly, defendants contend that sequestration is unconstitutional since it allows a seizure of their property without notice and with no provision whatever for a hearing as to the propriety of the seizure. While conceding for the purpose of this theory that *Gordon v. Michel, supra,* is at present dispositive of the need for notice and a hearing prior to the seizure of their stock, they argue that *Mitchell*

v. W. T. Grant Co., supra, mandates that this is permissible only if the defendant has available to him the means for a prompt and meaningful post-seizure hearing. They point out that under 10 *Del.C.* § 366 a nonresident defendant whose property has been sequestered cannot obtain a post-seizure hearing unless he first submits to *in personam* jurisdiction, and then the hearing to which he becomes entitled goes to the merits of the plaintiff's claim and his right to recover a personal judgment against him rather than to the justification for the sequestration in the first instance. They suggest that this amounts to no hearing at all on the seizure issue.

The short answer to this is that the authorities upon which defendants rely require a prompt hearing to determine whether or not the attachment was proper or if it should be dissolved and the property returned. Under 10 *Del.C.* § 366 the general appearance of the nonresident in the action authorizes him to petition for the immediate release of his property, and a hearing becomes necessary only if the plaintiff opposes this release in an effort to establish some assurance of payment for the judgment he hopes to recover. Thus, under Delaware sequestration, the property can be released from the attachment or a hearing initiated, if necessary, just as soon as the defendant chooses to appear. Assuming arguendo that it is proper to compel his appearance in this manner, then the promptness with which the sequestration is terminated or a hearing convened lies, in the first instance, in the hands of the defendant. Consequently, I cannot conceive that that the failure of either the statute or the Court rules to specifically require a hearing after the seizure is fatal under the rationale of *Mitchell.* (Defendants contend that it is not proper to compel their personal appearance in this way even if they do have attachable property interests in Delaware, but a discussion of this aspect of their motion is best suited for another segment hereof.)

Defendants further argue that under *Fuentes* and *Mitchell* three elements are necessary to constitutionally justify the omission of a pre-seizure hearing, regardless of its purpose. They suggest that these three elements are (1) a legitimate state interest, (2) a need for prompt action and (3) strict control by the state over the monopoly of its legitimate force. Their argument on the need for prompt action is bottomed on their assumption that stock ownership interests are not attachable where the stock certificates themselves are beyond the reach of the Court's jurisdiction. Since this theory has been rejected, there is no need to deal with it further here.

The argument as to a legitimate state interest also relies to a degree on this non-reachable property theory, and likewise loses this measure of its force. In addition, defendants urge that there can be no legitimate state interest such as sanctioned in *Gordon v. Michel* where the plaintiff is also a nonresident and where the cause of action arose outside the state. In *Gordon* it was held that the "interest of a state in aiding *its citizens* in prosecuting claims against nonresident defendants with property in the state has long been recognized." 297 A.2d 422. (Emphasis added.) But, defendants argue, this protective justification does not hold true where the plaintiff is not a citizen of the state.

In this approach, however, it seems to me that the defendants unfairly characterize the suit as an attempt by one nonresident to use the Delaware courts and sequestration process to recover a damage claim against other nonresidents. If this was all there was to it, their objection might be more persuasive. What this characterization overlooks, however, is that this is a derivative action brought to redress wrongs allegedly committed on a cor-

poration which is a creature existing in, under and by virtue of Delaware and its corporate laws. A rectification of any such wrongs and an appropriate recovery would benefit all stockholders of this Delaware entity, not just the plaintiff stockholder. As stated in *Gordon v. Michel* at 297 A.2d 422:

> "There is, indeed, a particular valid governmental interest in compelling appearance in a derivative suit in this jurisdiction because the corporation is organized here, an action can always be brought here for its benefit and the regulation of its internal affairs is governed by Delaware law. Speaking generally, a director or officer defendant should be obliged to respond in this jurisdiction which is in a unique position to make an authoritative determination of 'housekeeping' issues and to grant complete relief."

This being true, why should the interest of Delaware in the management and proper operation of its corporate entities be any less simply because the derivative suit is initiated by a nonresident stockholder as opposed to a resident stockholder? Or because the acts and decisions of management which are complained of actually took place in Illinois rather than in New Castle County? In view of the derivative nature of the suit, I do not feel that the fact that the plaintiff-stockholder here is a nonresident and that the alleged wrongs occurred in another jurisdiction distinguish this situation from *Gordon v. Michel* so as to hold the prehearing sequestration unconstitutional under the authorities cited.

As to the element of strict control by the state over its attachment processes, defendants point out that *Mitchell v. W. T. Grant Co.* was decided after *Gordon v. Mitchel*, and that consequently this Court has not considered *Mitchell's*

requirement that there be provision for review by a judge or other state official of sufficient authority to determine if a summary seizure without notice is appropriate to determine if a summary seizure without notice is appropriate before such a prehearing attachment can validly issue. They insist that the Delaware sequestration process cannot pass this test. Their reasoning runs as follows.

The sequestration statute contains no provision for review by this Court as to the necessity for its use. By case precedent it is established that a plaintiff is entitled to sequestration as a matter of right as long as his application meets procedural formalities, If the application is formally sound, this Court has no discretion to deny this right. *Breech v. Hughes Tool Co.*, Del.Supr., 189 A.2d 428(1963). Nor does the Court have the power to first consider the merits of the claim as a condition to authorizing sequestration. *Trans World Airlines, Inc. v. Hughes*, Del.Ch., 185 A.2d 762(1962), aff'd sub nom, *Breech v. Hughes Tool Co., supra*. Thus, it is argued, this Court has no power to prevent the summary use of its sequestration process by an individual and consequently the Delaware procedure lacks the element of judicial control found necessary in *Mitchell* to support a prehearing seizure without notice.

Again, however, I feel that the purpose of Delaware sequestration must be distinguished from an attachment process which enables a plaintiff to seize property held by another pending a trial on the issue of who has the right to keep it. In this latter case, as indicated by Mitchell, there is a need to have a proper authority review the application to evaluate whether there is probable merit to the claim as well as a danger that the property will be removed or dissipated if notice is first given. These same considerations are present in applications for immediate injunctive relief without notice. A procedure which leaves this determina-

tion to the interested plaintiff cannot pass constitutional muster as the recent trend of decision illustrates.

Here, however, the purpose is to compel the appearance of a nonresident who has property within this State. In order to establish the necessity for service by sequestration, there must be a showing that the defendant is a nonresident. In order to establish the right to proceed in this manner, it must also be shown that the nonresident defendant owns property in this State that can be reached by sequestration. This determination is not left to the plaintiff. On the contrary Rule 4(db) of this Court augments § 366 by providing that "[n]o order shall be entered under 10 *Del.C.* § 366" unless the nonresidency of the defendant appears in the complaint and unless the complaint is accompanied by the affidavit of the plaintiff "or other credible person" showing each defendant's last known address and also describing the property sought to be sequestered, giving its estimated value, identifying the nature of the defendant's title or interest, and disclosing the source of the affiant's information. If any of the foregoing are omitted, a reason must be given therefor. Thus both our Court rule and practice do provide for advance judicial review to determine that there is a factual basis for the service of process in this manner. The dual legal basis for its issuance, if the verified facts support it, is nonresidency plus ownership of property within the state. Being a jurisdictional tool only, its usage is not dependent upon the merits of the complaint as was true in *Fuentes* and *Mitchell*. The attachment powers of the state are not set in motion at the whim of the litigant. They are activated only by an order of this Court after it is satisfied that the plaintiff has demonstrated his right to invoke the sequestration statute so as to obtain jurisdiction over the nonresident defendant in an effort to get the merits of his case before the Court. The

Breech case, as I construe it, holds that the Court has no discretion to deny this statutory right to process once it is satisfied that a plaintiff has shown factors justifying the need to use it. In effect, this seems consistent with the instruction of *Mitchell*.

I find no basis for holding that 10 *Del.C.* § 366 is unconstitutional in that it fails to provide for strict control by the state in the use of its legitimate forces.

III.

Finally, the individual defendants attack § 366 on the theory that it is not truly an *in rem* proceeding, as held in *U.S. Industries Inc. v. Gregg, supra*. While recognizing that a state can obtain jurisdiction over nonresidents by an *in rem* attachment of their property within the state, *Pennoyer v. Neff, supra*, they argue that in such a case jurisdiction can only be acquired to the extent of the value of the property attached. They say that Delaware's sequestration statute clearly violates this since a nonresident, in order to secure the release of his property, must enter a general *in personam* appearance which thus exposes him to unlimited personal liability which may well exceed the value of the property attached. Thus, they contend, such a nonresident defendant is left with two choices once a sequestration order is issued. He can refuse to appear and run the risk of having his property sold to answer for any damages found due from him in his absence, or, he can submit to personal jurisdiction which the Court could not otherwise acquire and thereby expose himself to potential personal liability without limit.

To illustrate their point, they argue that in a true *in rem* proceeding a defendant has a right to appear for the sole purpose of defending the property attached, but that under Delaware's sequestration procedure he is not per-

mitted to do so. They argue that a person has fundamental due process right to remain immune from personal jurisdiction in a state with which he has no substantial relationship, *International Shoe Co. v. Washington,* 326 U.S. 310, 90 L.Ed.2d 95, 66 S.Ct.154(1945), and that due process further dictates that a waiver of this right is valid only if it results from voluntary action, *Hanson v. Denckla,* 357 U.S.235, 2 L.Ed.2d 1283, 78 S.Ct.1228(1958). Thus, they conclude, if a nonresident is compelled to submit generally to the jurisdiction of a court that otherwise would have none over him, in order to defend his property held by that court, there can be no voluntary waiver of this due process right.

However, I see no compelling reason to deviate from the conclusions of Judge Stapleton in *U.S. Industries Inc. v. Gregg,* before whom these same arguments were apparently advanced. At 348 F.Supp.1020 he noted as follows:

> "The state of a corporation's domicile may constitutionally provide, as Delaware has done, that the situs of its capital stock is in its home state. Thus, where stock of a domestic corporation is brought before the court, this provides a sufficient basis for the exercise of its *quasi in rem* jurisdiction even though the defendant may be a nonresident who has had no prior contacts with the forum state.
>
> "Gregg attempts to distinguish the relevant authorities by saying that this is not in reality a *quasi in rem* action. He correctly points out that the avowed purpose of Delaware's sequestration statute is to compel a general appearance and thereby produce a basis for *in personam* jurisdiction. While the statute is concededly designed to produce this result, it does not follow that the action is not one governed by the rules applicable to *quasi in rem* jurisdiction. Unless and until the nonresident defendant elects to enter a general appearance, the power of the court is limited to the application of the property before the court to the plaintiff's claim."

In short, the action as commenced is one against the property of the nonresident so as to induce his appearance, and at that point it is *quasi in rem* at best. If the nonresident is thereafter personally served or enters a general appearance, the action "also partakes of an in personam character." 6 *Am.Jur. 2d* 571, Attachment & Garnishment § 14. To the same effect: *Ownbey v. Morgan,* 256 U.S.94, 65 L.Ed.837, 41 S.Ct.433(1921); *Nelson v. McCormick,* Mich. Supr., 54 N.W.2d 694(1952); *Sherwood v. Porter,* Ida.Supr., 76 P.2d 928(1938).

Moreover, the defendants' argument that sequestration is unconstitutional because it compels them to submit to possible personal liability in excess of the value of the property seized seems to necessarily acknowledge that it is constitutional to compel their appearance through attachment to the extent of that property value. Compare *Pennoyer v. Neff, supra.* Thus it appears that their argument goes more to the effect of any judgment that the plaintiff might recover than it does to his right to compel their personal appearance by sequestration process. It seems to be an argument that it is unconstitutional to compel a nonresident to appear at all where there is a possibility that the plaintiff is seeking to recover an amount in excess of that which the law will allow even though he may be entitled to recover some lesser amount. I do not feel that this constitutes a valid constitutional attack in view of the long established authorities approving Delaware's jurisdictional attachment processes.

I thus find no basis in the arguments of the individual defendants to vacate the sequestration order and to dismiss the complaint against them.

IV.

The final item for consideration is the separate motion of the defendant Greyhound to either quash or modify the sequestration order. This motion stems from the language of the order which authorizes the sequestrator to demand that Greyhound make appropriate entries on its books to show that the securities owned by the individual defendants are being held by the sequestrator and that Greyhound further "do all acts necessary to hold and preserve these securities." The notice given Greyhound by the sequestrator pursuant to the order also directs the corporation "not to transfer or permit to be transferred any of said shares of stock" unless authorized by the sequestration order or subsequent order of the Court.

Greyhound points to the fact that the stock interests sequestered here are represented by negotiable securities, that both the certificates and their owners are outside Delaware, and that there is no order prohibiting the individual defendants from selling or transferring their shares to a purchaser who has no knowledge of these proceedings. Thus it suggests that the individual defendants are free to sell or transfer their stock certificates and retain the proceeds. Greyhound further points out that under the Uniform Commercial Code adopted by Delaware, securities are negotiable instruments, 5A *Del.C.* § 8-301, title passes upon the delivery of the certificate, 5A *Del.C.* § 8-102, and a bona fide purchaser acquires it "free of any adverse claim." 5A *Del.C.* § 8-105.

Greyhound also relies on the construction given to similar provisions of the Uniform Stock Transfer Act by Chancellor Seitz in *Haas v. Haas, supra,* wherein he held that even though Delaware had jurisdiction to determine ownership of stock under the statute placing its situs in Delaware for certain purposes, it must do so "with a recognition

of rights created by virtue of our Uniform Stock Transfer Act." 119 A.2d 362. The Chancellor further stated as follows at this same reference:

> "The statute giving this Court jurisdiction of such matters simply establishes the mechanics of service upon non-residents . . . and does not purport to freeze rights with respect to the ownership of property which may be brought within its ambit, particularly where 'negotiable' indicia of ownership are outstanding."

Thus, Greyhound's argument continues, since a bona fide purchaser of stock certificates takes free of adverse claims, he is entitled to insist that the issuer register the transfer of shares sold to him whether or not the transfer was rightful. 5A *Del.C.* § 8-401(1) (e). If the issuer refuses to do so or improperly delays, it becomes liable for any loss resulting to the purchaser. 5A *Del.C.* § 8-401(2). Consequently Greyhound asserts that the sequestration order which prohibits it from transferring any stock now owned by the individual defendants clearly exposes it to liability at the suit of a bona fide purchaser, transferee or pledgee of the individual defendants who would have a right under Delaware law to have it transferred.

As additional injury, it suggests that if it is to be bound by the sequestration order the commercial world will soon become aware that despite Delaware's adoption of the Uniform Commercial Code, stocks of Greyhound purchased on a national exchange may not be transferable because of undisclosed liens. This, it says, will cast a shadow over the tradeability of its listed stock and thus the derivative action ostensibly brought for its benefit will actually cause it immeasurable injury.

Because it contents that in either event it will suffer a deprivation of its property without due process, it asks that

the sequestration order either be vacated or else modified so as to exclude negotiable securities from its operation.

Greyhound urges that as a matter of policy its motion should be granted in order to show that Delaware favors the free and open transfer of stock as opposed to the confusion and loss that could flow from purchases of stock without knowledge of court-imposed attachment restriction on their transfer. I think, however, that the General Assembly spoke to this policy issue when it enacted the modified version of the Uniform Commercial Code in this State. 5A *Del.C.* § 8-317 reads in pertinent part as follows:

> "§ 8-317. Effect on attachment and sequestration laws; attachment or levy upon security
>
> "(1) Nothing contained in this title shall repeal, amend or in any way effect the provisions of sections 169 and 324, title 8, or sections 365 and 366, and chapter 35, title 10; and to the extent that any provision of this title is inconsistent with such sections, sections 169 and 324, title 8, and 365 and 366 and chapter 35, title 10, shall be controlling."

Thus by its terms the Delaware Uniform Commercial Code clearly provides that a proper sequestration, pursuant to 10 *Del.C.* § 366, of corporate stock having its situs in Delaware, pursuant to 8 *Del.C.* § 169, shall not be rendered invalid by any rights otherwise granted to owners or transferees of corporate stock by other provisions of the Code. In view of this I fail to see how it is within my power to declare as a matter of policy that sequestration is invalid as to securities having their situs in Delaware merely because they are made negotiable upon delivery by other portions of the Code. The intent of the statute would seem to accord some measure of protection to Greyhound if it should

refuse to register a transfer because it is complying with the sequestration order and thus 5A *Del.C.* § 8-317.

Two other factors should be noted. First, although *Haas* holds that the status of a bona fide holder for value is not necessarily lost because an action is pending concerning the ownership of stock or a restraining order against its transfer is outstanding, it must be kept in mind that that case involved a suit against the issuer and the record owner to compel a reregistration plus a restraining order against transfer pending a hearing. It did not involve an attachment of the stock by a court-appointed sequestrator. Obviously then, *Haas* arose from a violation of a restraint imposed on the defendants and thus involved no attempt by the Court to exercise control over either the stock certificates or the stock itself because of its situs. No doubt this same result would hold true under the Uniform Commercial Code in a similar factual setting. At the same time, I do not feel that *Haas* requires a reading of any more than what it says, namely, that where one makes a bona fide acquisition of stock from an owner who has been enjoined from transfering it, without knowledge of such restraint, and consequently where the stock itself was never before the court, his title is not necessarily defeated because of the existence of the *in personam* order against his transferor. I see no reason to read it as holding the same result to apply where the action is a *quasi in rem* proceeding to seize the stock itself, especially in light of the aforesaid legislative mandate.

Secondly, as pointed out in *Trans World Airlines, Inc. v. Hughes Tool Company*, Del.Ch., 187 A.2d 350(1962), our sequestration practice attempts to minimize the burden placed on one whose stock has been sequestered by giving him the right to control the investment of his seized property pending his appearance. The order does so here by

allowing the individual defendants to authorize the transfer and sale of the stock at any time on the condition that the proceeds be deposited with the sequestrator subject to investment and reinvestment by him on such terms and conditions as directed by the defendants. Thus the defendants are free to transfer their stock, and Greyhound is free to register the transfer provided it is done through the sequistrator and the price received is not less than its market value. Also, this Court can permit and consider an application for release from sequestration made by one other than the record owner who claims a prior or superior right to ownership.

In addition, as plaintiff points out, an issuer is only under a duty to register a transfer of securities if, among other things, it has no duty to inquire into adverse claims to them. 5A *Del.C.* § 8-401(1)(c). If it has notice of an adverse claim (as certainly the notice from the sequestrator would provide), it must notify the adverse claimant that it will register the transfer within 30 days unless "an appropriate restraining order, injunction or other process issues from a court of competent jurisdiction." 5A *Del.C.* § 8-403(2)(a). Presumably if such process does issue, the issuer cannot be held liable thereafter for refusing to register the transfer. If court process issued subsequent to a presentation for registration will protect an issuer from liability for failing to do so, I see no reason why process issued prior to such a request would be any less protective.

For these reasons, I feel that Greyhound's fear of liability and loss are more fanciful than real, and similarly I am not convinced that the sequestration order deprives it of property without due process of law.

V.

For the reasons set forth herein, the motions of both the individual defendants and the defendant Greyhound to

quash and vacate the order of sequestration and, in the case of the individual defendants, to dismiss the complaint as to them, are hereby denied.

IT IS SO ORDERED.

Very truly yours,
/s/ GROVER C. BROWN

GCB:mlw
cc: Register in Chancery

IN THE
SUPREME COURT OF THE
STATE OF DELAWARE

—

No. ____, 1975

—

THE GREYHOUND CORPORATION, R. F. SHAFFER, J. L. KERRIGAN, F. L. NAGEOTTE, GERALD H. TRAUTMAN, BART COOK, R. N. DICK, WILLIAM E. HASTINGS, HOWARD BOYD, H. A. MONTAGUE, RANKIN M. SMITH, HANS STAUFFER, HAROLD C. STUART, JAMES W. WALKER, LESLIE B. WORTHINGTON, JESS NICKS, RALPH C. BATASTINI, ROBERT MINGE BROWN, DAVID L. DUENSING, CHARLES R. OREM, CLIFTON B. COX, and M. H. O'ROURKE,

Defendants Below—Appellants,

vs.

ARNOLD HEITNER, as custodian for
MARK ANDREW HEITNER,
Plaintiff Below—Appellee.

—

APPEAL FROM OPINION AND ORDER OF THE COURT OF CHANCERY OF THE STATE OF DELAWARE, IN AND FOR NEW CASTLE COUNTY, BY VICE CHANCELLOR GROVER C. BROWN, DATED MAY 12, 1975, IN CIVIL ACTION NO. 4514 IN THAT COURT.

—

NOTICE OF APPEAL

TO: Howard M. Handelman, Esquire
Bayard, Brill & Handelman
300 Market Tower
Wilmington, DE 19801
Attorneys for Plaintiff Below-Appellee

PLEASE TAKE NOTICE that The Greyhound Corporation, R. F. Shaffer, J. L. Kerrigan, F. L. Nageotte, Gerald H. Trautman, Bart Cook, R. N. Dick, William E. Hastings, Howard Boyd, H. A. Montague, Rankin M. Smith, Hans Stauffer, Harold C. Stuart, James W. Walker, Leslie B. Worthington, Jess Nicks, Ralph C. Batastini, Robert Minge Brown, David L. Duensing, Charles R. Orem, Clifton B. Cox, and M. H. O'Rourke, do hereby appeal to the Supreme Court of the State of Delaware from the opinion and order of the Court of Chancery of the State of Delaware, in and for New Castle County, by Vice Chancellor Grover C. Brown, dated May 12, 1975, in Civil Action No. 4514 in that Court.

/s/ RICHARD F. CORROON
Richard F. Corroon
Potter Anderson & Corroon
350 Delaware Trust Building
Wilmington, DE 19801
Attorneys for Defendant Below-Appellant The Greyhound Corporation

/s/ E. N. CARPENTER, II
E. N. Carpenter, II

/s/ R. FRANKLIN BALOTTI
R. Franklin Balotti
Richards, Layton & Finger
4072 DuPont Building
Wilmington, DE 19801
Attorneys for Defendants Below-Appellants R. F. Shaffer, J. L. Kerrigan, F. L. Nageotte, Gerald H. Trautman, Bart Cook, R. N. Dick, William E. Hastings, Howard Boyd, H. A. Montague, Rankin M. Smith, Hans Stauffer, Harold C. Stuart, James W. Walker, Leslie B. Worthington, Jess Nicks, Ralph C. Batastini, Robert Minge Brown, David L. Duensing, Charles R. Orem, Clifton B. Cox, and M. H. O'Rourke

The undersigned, attorney of record for the appellee above named, hereby signifies his acceptance and acknowledgment of service of the foregoing Notice of Appeal, in duplicate, this third day of June, 1975.

/s/
Howard M. Handelman

IN THE
SUPREME COURT OF THE
STATE OF DELAWARE

—

No. 132, 1975

—

THE GREYHOUND CORPORATION, et al.,
Defendants Below, Appellants,

vs.

ARNOLD HEITNER, as custodian for
MARK ANDREW HEITNER,
Plaintiff Below, Appellee.

—

OPINION

Argued: October 15, 1975
Decided: April 15, 1976

Before DUFFY and McNEILLY, Justices and TAYLOR, Judge

Upon appeal from the Court of Chancery. Affirmed in part.

Richard F. Corroon and Richard E. Poole, of Potter Anderson & Corroon, Wilmington, for defendant-appellant The Greyhound Corporation.

Max Terry, Jr., of Terry, Terry & Jackson, Dover, and William W. Schwarzer and Lynn H. Pasahow, of McCutchen, Doyle, Brown & Enersen, San Francisco, for individual defendants-appellants.

Joshua M. Twilley, of Twilley, Jones & Feliceangeli, Dover, and Michael F. Maschio and Carol Faye Simkin, of

Cowan, Liebowitz & Latman, P.C., New York City, for plaintiff-appellee.

DUFFY, Justice:

The single question at issue in this appeal is the constitutionality of the Delaware Sequestration Statute and the related procedures thereunder. In our view, they do not violate due process of law requirements and, accordingly, we affirm the judgment of the Court of Chancery.

I.

The Sequestration Statute, 10 *Del. C.* § 366, has been an integral part of our law since 1927.[1] 35 *Del.L.* ch. 217;

1. In its present form 10 *Del.C.* § 366 provides:

"(a) If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such nonresident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for 3 consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

(b) The Court may make all necessary rules respecting the form of process, the manner of issuance and return thereof, the release of such property from seizure and for the sale of the property so seized, and may require the plaintiff to give approved security to abide any order of the Court respecting the property.

"(c) Any transfer or assignment of the property so seized after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized and sold and such sale and confirmation shall transfer to the purchaser all the right, title and interest of the defendant in and to the property as fully as if the defendant had transferred the same to the purchaser in accordance with law."

Sands v. Lefcourt Realty Corporation, Del.Supr., 117 A.2d 365 (1955). Over the years since then a long line of cases has established the purpose of the Statute, its rationale and the procedure thereunder. Reference is made to those cases for a fuller definition of such matters.[2]

In *Ownbey v. Morgan*, 256 U.S. 94, 41 S. Ct. 433 (1921), the United States Supreme Court held that the Delaware foreign attachment statute was constitutional and, since the equitable remedy under § 366 is analogous to foreign attachment, *Sands v. Lefcourt Realty Corporation* supra, it is fair to say that *Ownbey* has been long regarded by the Courts of this State as authority for the constitutionality of the Sequestration Statute. Cf. *Wiley v. Copeland*, Del.Supr., 349 A.2d 211 (1975); *Gordon v. Michel* supra.

By its nature a foreign attachment, whether legal or equitable, involves a prejudgment seizure of property as a basis for jurisdiction and/or as a source of satisfaction for any judgment ultimately awarded on the merits of the claim. Such a proceeding has the seeds if not the fruits of unfairness in permitting the impounding of property before judgment and, under some circumstances, upon thin asser-

2. See, for example, *Sands v. Lefcourt Realty Corporation* supra; *Greene v. Johnston*, Del.Supr., 99 A. 2d 627 (1953); *Loft, Inc. v. Guth*, Del.Supr., 19 A. 2d 721 (1941); *Gordon v. Michel*, Del.Ch., 297 A. 2d 420 (1972); *Trans World Airlines, Inc. v. Hughes Tool Company*, Del.Ch., 187 A. 2d 350 (1962); *Cantor v. Sachs* Del.Ch., 162 A. 73 (1932); Folk, *The Delaware General Corporation Law*, p. 565.

tions of right. But, as the discussion by Justice Pitney in *Ownbey* demonstrates, the practice traces its origin to early colonial days and, indeed, beyond them to the "custom of London." In law, however, as in the life it reflects, what is old is not necessarily good. Neither, we hasten to add, is it necessarily bad. But, as we are often reminded, due process concepts involve evolving standards of fairness and so the test for constitutionality is necessarily dynamic. Much has been decided and written about such concepts in recent years including their implications for Delaware sequestration procedures. See, for example, the thoughtful study by Folk and Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 Colum. L. Rev. 749 (1973).

For present purposes the current due process standards must largely be distilled from a quartet of decisions by the United States Supreme Court, all of which involved prejudgment seizures of property; they are: *North Georgia Finishing, Inc., v. Di-Chem, Inc.*, ____ U.S. ____, 95 S. Ct. 719 (1975); *Mitchell v. W. T. Grant Company*, 416 U.S. 600, 94 S. Ct. 1895 (1974); *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820 (1969).

Those decisions provide a foundation for renewed constitutional attack upon the Sequestration Statute. The argument seems first to have been made in the Court of Chancery in *Gordon v. Michel* supra, but it was rejected as the Court concluded that *Ownbey* remained viable and that 10 *Del.C.* § 366 still passed constitutional muster. Following *Gordon* other Chancery decisions reached the same result. Then in *Wiley v. Copeland* supra this Court, in a brief *per curiam* opinion, found § 366 constitutional on the same rationale announced in *Gordon*.

This appeal came on for hearing shortly after *Wiley* was decided but we permitted full exploration of the issues

in briefing and at oral argument because of the important questions involved, and because certain arguments are made herein which were not fully answered in *Wiley*.

Against that background, we now focus on this appeal.

II.

This is a stockholder's action, derivative in character and brought on behalf of The Greyhound Corporation (Greyhound) against some twenty-eight individuals (defendants) including directors of Greyhound (or its corporate predecessors) who served at various times between 1957 and 1974. The complaint alleges that Greyhound suffered significant loss and damage as a result of conduct by defendants which is said to have caused Greyhound to be found (by the United States District Court for the Northern District of Illinois) in violation of certain antitrust laws. The complaint also attacks the distribution of benefits under Greyhound's deferred compensation and stock option plans.

None of the defendants is a Delaware resident, all were served under the Sequestration Statute and relevant Rules of the Court of Chancery. Apparently, the Court-appointed Sequestrator seized certain Greyhound shares of stock and/or contract rights which defendants, respectively, had under agreements with Greyhound. The Court of Chancery denied both a motion by the individual defendants to dismiss the complaint for lack of jurisdiction and a motion by all defendants to vacate the order of sequestration. This appeal followed.

III.

The thrust of defendants' argument is that the sequestration procedure is inconsistent with controlling constitu-

tional principles. They say that the procedure, including that which obligates them to appear generally before defending on the merits, violates their right to due process of law.

Defendants argue that the minimum contacts requirements of *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S. Ct. 154 (1945), must be met before *personam* jurisdiction is assumed and they say that they are entitled to a meaningful right to be heard under *Boddie v. Connecticut,* 401 U.S. 371, 91 S. Ct. 280 (1971), before their property may be seized. And, they continue, the passage of time and changing concepts of due process "have rendered *Ownbey* obsolete."

A.

There are significant constitutional questions at issue here but we say at once that we do not deem the rule of *International Shoe* to be one of them. An argument based on that case was made in *Breech v. Hughes Tool Company,* Del.Supr., 189 A.2d 428 (1963), and rejected by this Court. Compare *Hibou, Inc. v. Ramsing,* Del.Super., 324 A.2d 777 (1974). We are not persuaded that *Breech* should now be abandoned. The reason, of course, is that jurisdiction under § 366 remains, as it was in 1963, *quasi in rem* founded on the presence of capital stock here, not on prior contact by defendants with this forum. Under 8 *Del.C.* § 169[3] the "situs of the ownership of the capital stock of all corporations existing under the laws of this State . . . [is] in this State", and that provides the initial basis for jurisdiction.

3. *Del.C.* § 169 reads in full as follows:

"For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State."

Delaware may constitutionally establish situs of such shares here, *Rogers v. Guaranty Trust Co, of New York,* 288 U.S. 123, 53 S. Ct. 295 (1932); *Jellenik v. Huron Cooper Min. Co.,* 177 U.S. 1, 20 S. Ct. 559 (1900), it has done so and the presence thereof provides the foundation for § 366 in this case. Cf. *Breech v. Hughes Tool Company* supra. On this issue we agree with the analysis made and the conclusion reached by Judge Stapleton in *U.S. Industries, Inc. v. Gregg,* D.Del., 348 F. Supp. 1004 (1972).

We hold that seizure of the Greyhound shares is not invalid because plaintiff has failed to meet the prior contacts tests of *International Shoe.*

As to *Boddie,* we agree that it contains an important summary of due process requirements, including a "meaningful opportunity" to be heard before one is deprived of any significant property interest. But the implication of *Boddie* for this appeal may best be understood, not by reference to its general principles but in light of an analysis of *Sniadach, Fuentes, Mitchell* and other cases dealing with foreign attachments. And now we turn to those cases.

B.

In *Sniadach,* decided in 1969, the Supreme Court invalidated on due process grounds a Wisconsin statute which authorized garnishment of wages, at the request of a creditor's lawyer, before trial without any opportunity for the wage owner to be heard or to tender a defense. In the absence of "notice and a prior hearing," said the Court, the procedure was deemed unconstitutional. But, writing for the Court, Justice Douglas recognized an *Ownbey* exception in so many words; after referring to seizure without notice or hearing he said:

> "Such summary procedure may well meet the requirements of due process in extraordinary situations.

. . . *Ownbey v. Morgan*. . . ." 395 U.S. at 339, 89 S.Ct. at 1821.

Some three years later the Court decided *Fuentes*, in which it invalidated Florida and Pennsylvania prejudgment replevin statutes applied to household goods sold under conditional sales contracts. The statutes denied the purchasers the opportunity to be heard before seizure and that, said the Court, violated due process, in each instance. The writ issued on bare assertions of right and in neither State was a judge involved. Speaking for the Court, Justice Stewart said:

> "We hold that the Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor. . . ." 407 U.S. at 97, 92 S.Ct. at 2002.

But, citing *Boddie*, he stated that there "are 'extraordinary situations' that justify postponing notice and opportunity for a hearing"; and he added a footnote, saying:

> "In three cases, the Court has allowed the attachment of property without a prior hearing. In one, the attachment was necessary to protect the public against the same sort of immediate harm involved in the seizure cases—a bank failure. *Coffin Brothers & Co. v. Bennett*, 277 U.S. 29, 48 S.Ct. 422, 72 L. Ed. 768. Another case involved attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest. *Ownbey v. Morgan*, 256 U.S. 94, 41 S.Ct. 433, 65 L. Ed. 837." *Fuentes v. Shevin* supra 407 U.S. at 91, 92 S.Ct. at 1999, n.23.

Two years later the Court decided *Astol Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S. Ct. 2080 (1974), in which, citing *Fuentes*, *Sniadach* and *Boddie* it again found and applied in Justice Brennan's language "one of those 'extraordinary situations' that justify postponing notice and opportunity for a hearing." In applying the "limited circumstance" test stated in *Fuentes*, he noted that the seizure (of a yacht) served a significant governmental purpose by permitting Puerto Rico to assert *in rem* jurisdiction over the property in order to conduct forfeiture proceedings; the following footnote was cited to that quotation, again implicitly approving *Ownbey:*

> "Cf. *Ownbey v. Morgan*, 256 U.S. 94, 65 L. Ed. 837, 41 S. Ct. 433, 17 ALR 873 (1921), cited with approval in *Fuentes v. Shevin* supra, at 91 n.23, 32 L. Ed. 2d 556."

It seems clear from the writing of three different Justices in the above three cases that until May 15, 1974 *Ownbey* was still viable for some purposes; indeed, all three had referred to the case by name, with explicit or implicit approval.

The next case in time, *Mitchell*, was also decided in 1974. There Justice White referred to prejudgment seizures approved under the special circumstances found in *Ewing v. Mytinger and Casselberry*, 339 U.S. 594, 70 S. Ct. 870 (1950) and then said,

> "More precisely in point, the Court had unanimously approved prejudgment attachment liens effected by creditors, without notice, hearing or judicial order, saying that 'nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent

for its affect upon the result of the suit.' 'The fact that the execution is issued in the first instance by an agent of the State but not from a court, followed as it is by personal notice and a right to take the case into court, is a familiar method in Georgia and is open to no objection.' Coffin Brothers v. Bennett. . . . To the same effect was the earlier case of Ownbey v. Morgan. . . . Furthermore, based on *Ownbey* and *Coffin*, the Court later sustained the constitutionality of the Maine attachment statute. McKay v. McInnes, 279 U.S. 820, 49 S. Ct. 344, 73 L. Ed. 975 (1928).

. . .

The judgment of the Maine court was affirmed without opinion citing *Ownbey* and *Coffin*." *Mitchell v. W. T. Grant Company* supra, ____ U.S. at ____, 94 S. Ct. at 1903.

While the Court's discussion of *Ownbey* is arguably less than explicit approval, it seems clear that it was not overruled and, indeed, in our view the Court looked to it as precedent for approval of the Louisiana sequestration statute in *Mitchell*.

In 1975 the Court decided *North Georgia Finishing, Inc. v. Di-Chem, Inc.* supra, in which it invalidated a Georgia garnishment statute that permitted prejudgment seizure of property on an affidavit of plaintiff or his attorney. The Court noted that in *Fuentes*, Fourteenth Amendment violations were found "[b]ecause the official seizures had been carried out without notice and without opportunity for a hearing or other safeguard against mistaken repossession" and, said Justice White for the Court, "[t]he Georgia statute is vulnerable for the same reasons." While his opinion does not refer to *Ownbey*, the concurrence by Justice Powell cites it as an illustration of "unanimously approved pre-judgment attachment liens" under the "traditional view of procedural due process."

C.

While the significance of these decisions for foreign attachment statutes in the States is by no means complete, or clear, we can, we think, draw two inferences from what the Court has said about *Ownbey*. First, an attachment which is necessary to secure jurisdiction in a State court is an "extraordinary situation" under *Boddie*. *Fuentes* so holds in so many words (denoting it as "clearly a most basic and important public interest") and the same view is echoed in *Astol Calero-Toledo*, in *Mitchell* and by Justice Powell in his concurring opinion in *North Georgia*. The second inference is that, given an "extraordinary situation", pre-seizure notice and hearings are not required by the due process clause,[4] *Jonnet v. Dallas Savings Bank*, 3 Cir. ____ F.2d ____ (1976). Those inferences seem reasonable and they are certainly addressed to the common sense of what is involved: prior notice of seizure would permit a defendant to divest the court of a jurisdiction which, by definition, it has over the *res*—he could simply take it out of the State or defeat jurisdiction by a transfer of title. And a plaintiff would thus lose a right, which he would otherwise have, to take the case into court. We hold that § 366 is not unconstitutional because seizure precedes notice and hearing.

In *North Georgia* the Supreme Court based its ruling on the absence of "notice and . . . opportunity for a hearing or other safeguard." The disjunctive character of that quo-

4. It is not clear whether the presence of adequate safeguards alone will comport with due process where there was no pre-seizure notice and hearing, or whether the safeguard procedure is available only under extraordinary situations as identified in *Boddie*. We need not decide the question because, for the reasons already stated, we think that the United States Supreme Court has said that *Ownbey* qualified under *Boddie* and so, inferentially, does § 366.

tation from Justice White supports our conclusion that prior notice and hearing are not mandated by the Fourteenth Amendment. But "other safeguards" are required if the sequestration procedure is to square with the Constitution. So we must now examine § 366 from that point of view. Precisely what requirements the Court has in mind for safeguards is not certain but some insight is available from what it has approved and what it has criticized. It has said, for example, that there must be a hearing and judicial determination "before one is finally deprived of his property," *Mitchell v. W. T. Grant Company* supra. And in *North Georgia* the Court made a number of criticisms about the procedure, including the fact that the writ issued at the order of a clerk without participation by a judge, the affidavit was sufficient with conclusory allegations made by an attorney without personal knowledge of the facts, the debtor was deprived of the use of the property and there was no provision for an early hearing.

Since the requirements of due process "are not technical, nor is any particular form of procedure necessary," *Mitchell v. W. T. Grant Company* supra, we deem it unnecessary to litmus test Delaware sequestration procedure against every facet of the foreign attachment proceedings approved or invalidated in the governing cases we have reviewed. We review, rather, certain of the significant features of the Delaware procedure which seem relevant to the respective interests of the parties.

D.

As the Third Circuit said in *Jonnet*, a plaintiff has two interests in invoking foreign attachment procedures: to establish jurisdiction in the forum and to restrain a *res* within the control of the Court for eventual payment of a judgment. In Delaware the first of these is the principal and under most circumstances the exclusive basis for sequestration. Indeed, by its terms § 366 permits the "Court [to] . . . compel the appearance of the defendant by the seizure," a purpose underscored by the cases. Cf. *Sands v. Lefcourt Realty Corporation* supra; *Gordon v. Michel* supra.

On this point we pause to note, as did the Vice Chancellor, that *Sniadach, Fuentes, Mitchell* and *North Georgia* all involved prejudgment seizures, by attachment proceedings, for the purpose of collecting moneys claimed to be owed. And so did the most recent decision by the Supreme Court on this question: *Carey v. Bert Randolph Sugar,* ____ U.S. ____, ____ S. Ct. ____, 44 L. W. 4416 (3/24/76). All of these cases involve claims by creditors against resident debtors, none sought attachment to establish state jurisdiction which is what this appeal is all about.[5] While that difference may be determinative in distinguishing this case from creditor type cases, we do not base our conclusion on it.

As to safeguards or protection of a defendant's interest, the following appear significant to us:

(1) An order of Court is required to initiate the § 366 process and, beyond doubt, that requires an order of a Judge of the Court of Chancery who has control of the process at all times.

(2) The property to be seized must be identified with reasonable certainty in the Court order.[6] *Cannon v. Union*

5. The statute permits seizure only if defendant is a non-resident. See § 366, *Wife v. Husband,* Del. Ch., 271 A. 2d 51 (1970). Compare *Astol Calero-Toledo v. Pearson Yacht Leasing Co.* supra.

6. Chancery Rule 4(db) provides in part:

"No order shall be entered under 10 *Del.C.* § 366 unless it appears in the complaint that the defendant or any one or more of the defendants is a nonresident of the State of Delaware and the application therefor is accompanied by the affidavit of a plaintiff or other credible person stating:

(a) As to each nonresident defendant whose appearance is sought to be compelled, his last known address or a statement that such address is unknown and cannot with due diligence be ascertained.

Chemical & Materials Corp., Del.Ch., 144 A.2d 145 (1958). Compare *Baker v. Gotz*, D.Del. 336 F. Supp. 197 (1971); aff'd 492 F.2d 1238; cert. den. 417 U.S. 955, 94 S. Ct. 3084 (1974).

(3) The value of the property seized must be reasonably related to the amount of the claim asserted.[7] *Trans-World Airlines, Inc. v. Hughes*, Del.Ch., 185 A.2d 762 (1962), aff'd 185 A.2d 886 (1962).

(4) Following seizure, notice thereof must be promptly given to defendant. § 366, Chancery Rule 4(db).

(5) A general appearance is required before release of property seized, but under both the statute and the Chancery practice a defendant has a right to appear solely for the purpose of attacking compliance with § 366 and the Rules of Court.[8] *Schwartz v. Miner*, Del.Ch., 133 A.2d 599 (1957). Indeed, defendants are doing that very thing here without having made a general appearance. If sequestration is determined to be valid, each defendant has

6. (Cont'd.)
   (b) The following information as to the property of each such defendant sought to be seized:
      (1) A reasonable description thereof.
      (2) The estimated amount and value thereof.
      (3) The nature of the defendant's title or interest therein; and if such title or interest be equitable in nature, the name of the holder of the legal title.
      (4) The source of affiant's information as to any of the items as to which the affidavit is made on information and belief.
      (5) The reason for the omission of any of the required statements."

7. Sequestration is available only when a money judgment is sought. *Steinberg v. Shields*, Del.Ch., 152 A.2d 113 (1959).

8. Such an appearance is made under Chancery Rule 12(b) by filing a motion to dismiss for lack of jurisdiction. In earlier days a "special appearance" was permissible for the same purpose. See, for example, *Whitman v. San Francisco Bay Toll Bridge Co.*, Del.Ch., 142 A. 783 (1928).

an option to appear generally or not.[9] *Schwartz v. Miner* supra.

(6) After seizure a defendant who has entered a general appearance may petition for release of the property and the "Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured."

(7) A defendant who elects to appear generally after seizure will be called upon to litigate only those causes of action asserted against him in the original complaint; he may not be confronted with new causes of action. *Tenney v. Jacobs*, Del.Supr., 240 A.2d 138 (1968); *Townsend Corporation of America v. Davidson*, Del.Ch., 181 A.2d 219 (1962)

(8) While the property seized is in the control of the Court, a defendant does not lose all rights over it. Thus the sequestration order entered in this case, which follows what we understand to be the usual practice, states:

> "4. In the event that the defendants or any one of them shall make a bona fide sale or sales of any of the aforesaid property seized hereunder, and shall receive therefor not less than the market price at the time of sale and shall deposit with the Sequestrator the proceeds of such sale or sales, the Sequestrator shall forthwith advise the Greyhound Corporation of such facts and thereupon the property sequestered and seized and so sold shall be released from such sequestration

9. Discovery is available for the purpose of determining whether there has been an effective sequestration, cf. *Kolyba v. Banque Nationale de Paris*, Del.Ch., 316 A.2d 585 (1973), but it may not be had for a fishing expedition to find property subject to seizure. *Chavin v. Gluck*, Del.Ch., 216 A.2d (1965).

and seizure without further action of any kind by the Sequestrator or this Court; and in such event, the proceeds of any such sale shall be held by the Sequestrator until further order of this Court in lieu of the property initially seized and so sold; provided, further, that the proceeds of any such sale or sales shall be subject to investment and reinvestment by the Sequestrator in such property and upon such terms and conditions as the defendants may from time to time direct in writing, provided always that the property in which such proceeds are invested and reinvested (as well as any uninvested proceeds of any sale of such property) shall be held by and in the name of the Sequestrator, pursuant to the terms of this Order and until further Order of this Court.

"In the event that said Greyhound Corporation shall desire to make any payments under any agreement, contract or other legal instrument of any kind whatsoever between any of said defendants and said corporation being seized under this Order by the Sequestrator, any such obligations, rights, debts or credits may be discharged by the payments of the sums due from said corporation, as may be appropriate, to the Sequestrator and said corporation, as may be appropriate, may receive a full and complete discharge of said contractual obligations, rights, debts or credits from each or any of said defendants, and the Sequestrator hereinbefore appointed; and in such event, the proceeds of the payment of any of the aforesaid contractual obligations, rights, debts or credits shall be held by the Sequestrator until the further order of this Court in lieu of the contractual obligations, rights, debts, or credits initially seized and so paid or discharged, provided further that the proceeds of any such payment or payments shall be subject to investment and reinvestment by the Sequestrator upon such terms and conditions as each or any of said defendants may from time to time direct in writing; provided always that the property in which such proceeds are invested and reinvested (as well as any uninvested proceeds of any such payment) shall be held by and in the Sequestrator, pursuant to the terms of this Order and until the further Order of this Court."

In addition to those safeguards, we think that there is another (from a defendant's point of view) which has not been emphasized in the cases but which is implicit in § 366. The statute permits a defendant who has appeared generally to petition for release of seized property and

> "[t]he Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured."

In order to make such a determination the Court of necessity must be informed not only of the value of the property seized but also of what effect release of the property will have on satisfaction of any judgment which plaintiff may secure. To know that, *i.e.*, what judgment may be secured, the Court must be informed about the possible amount of such judgment and, clearly, that means at least some preliminary inquiry into the merits of the claim. Cf. *Carey v. Bert Randolph Sugar* supra. Compare Vice Chancellor Marvel's 1969 ruling in *Trans World Airlines, Inc. v. Hughes* supra in which he said that ". . . of course, the property . . . seized should always bear some reasonable relationship to the amount of the claim asserted." Manifestly, the com-

plaint or other statement by a plaintiff cannot be conclusive on the value or merits of the claim.

In sum, the sequestration procedure is at all times under the control of a judge; a defendant has a right to litigate compliance with the Statute and the Rules of Court without appearing generally; if the Court determines that there has been a valid seizure a defendant may then elect to appear generally; if he does so appear he is entitled to release of the property unless plaintiff meets the statutory terms; and a defendant is entitled to a hearing to test the reasonableness of the value of the property seized, including to the extent pertinent, the merits of plaintiff's claim.

In our view, § 366 and the related procedures provide a reasonable balancing of interests between plaintiff and defendants and assure to the latter the safeguards required under current guidelines established by the United States Supreme Court.

E.

Defendants' argue also that compelling them to make a general appearance before defending on the merits violates their right to due process. They rely principally on decisions by Courts in New York holding that an obligation under a liability insurance policy may be a basis for jurisdiction over personal injury litigation, but liability of a nonresident defendant who appears is limited to the face value of the policy. *Farrell v. Piedmont Aviation, Inc.*, 2dCir., 411 F.2d 812 (1969);; *Minichiello v. Rosenberg*, 2dCir., 410 F.2d 106 (1968), cert. den., 396 U.S. 844, 90 S. Ct. 69, 24 L.Ed.2d 94 (1969); *Jarvik v. Magic Mountain Corp.*, S.D. N. Y., 290 F. Supp. 998 (1968); *Simpson v. Loehmann*, N.Y.App., 234 N.E.2d 669 (1967); rearg. den., 238 N.E.2d 319 (1968).

We do not regard the rationale of those cases as persuasive authority for the due process argument which de-

fendants make here. As the cited cases indicate, the theory of suit and the practice thereunder spawned a considerable volume of Federal-State litigation which has apparently resulted in settled law in New York. But the attachment theory and the limited liability imposed on an appearing defendant have apparently been adopted only in New York. See *Ann.* 33 A.L.R.3d 992. And even in New York the doctrine is limited to claims based on an insurance policy. Thus in *Simpson v. Loehmann* the New York Court of Appeals said:

> "This, it is hardly necessary to add, means that there may not be any recovery against the defendant in this sort of case in an amount greater than the face value of such insurance policy even though he proceeds with the defense on the merits. Consideration of CPLR 320 (subd. [c]) and its effect in other types of action begun by attachment must, of course, await future cases." 238 N.E.2d at 320.

We decline to proceed here on the basis of what New York alone has done in personal injury claims under insurance policies.

We agree with Judge Stapleton also when he said in *U.S. Industries*, 58 F.R.D. at 479, that there is a "legitimate public interest behind the general appearance rule"; it promotes judicial economy by concentrating the settlement of claims in one jurisdiction or action. And, that is particularly desirable in the kind of controversy here involved. According to the amended complaint, this is essentially an intra-corporate dispute between a complaining shareholder, who sues for the corporation, alleging loss and damage resulting from conduct of defendants in their respective capacities as directors and/or officers of Greyhound. The charges are that defendants caused the Corporation to be

in contempt of orders of the United States District Court for which substantial fines were imposed on Greyhound, caused to violate the anti-trust laws, and unjustly enriched themselves through stock options and deferred compensation plans. Such a controversy surely has a substantial relationship to this forum, *Folk and Moyer* supra, and litigation here will eliminate the possibility of duplicate actions elsewhere with varying results.

We hold that § 366 is not unconstitutional because it requires defendants to appear generally before defending on the merits.

IV.

Defendants argue also that the sequestration procedure is unconstitutional as applied to the interests of security holders whose certificates are located outside the State. They say that the certificates for the seized shares are physically outside Delaware and that the statutory attempt under 8 *Del.C.* § 169 to reserve the situs of shares here is "to indulge in a fiction."

The argument is based largely, if not exclusively, on the right of a bona fide purchaser who acquires a certificate and, so far as we are informed, there is no such purchaser among defendants. As to these defendants, we have already determined that the shares have a situs here, *Rogers v. Guaranty Trust Co. of New York* supra; *Jellenik v. Huron Copper Min. Co.* supra; *U. S. Industries, Inc. v. Gregg* supra; compare *Breech v. Hughes Tool Company* supra, and, for present purposes that is conclusive on this contention.

V.

Finally, we turn to the argument made by Greyhound Corporation, for whose benefit plaintiff alleges that he sues.

Greyhound says that the sequestration order deprives it of property without due process of law. It attacks that part of the order under which the Sequestrator directed it "not to transfer or permit to be transferred any of said shares of stock," (*i.e.*, the seized shares) except pursuant to Court order. Relying on *Haas v. Haas*, Del.Ch., 119 A.2d 358 (1955), Greyhound argues that the individual defendants retain the power to pass good title to their shares to a good faith purchaser and that under the Uniform Commercial Code (6 *Del.C.* §§ 8-301, 8-102, 8-105) such a transferee would take title unaffected by the sequestration proceedings; and, Greyhound continues, it would be obliged to transfer the shares on its books or be liable for any loss resulting from a refusal or a delay in doing so. 6 *Del.C.* § 8-401(2).[10]

The Vice Chancellor disposed of Greyhound's argument on the basis of the Uniform Commercial Code, 5A *Del.C.* § 8-317, which reads:

> "Nothing contained in this subtitle shall repeal, amend or in any way effect the provisions of sections 169 and 324, title 8, or sections 365 and 366, and chapter 35, title 10; and to the extent that any provision of this subtitle is inconsistent with such sections, sections 169 and 324, title 8, and 365 and 366 and chapter 35, title 10, shall be controlling.

He noted the priority of § 366 by the terms of the Uniform Commercial Code and suggested that Greyhound could find protection by complying with the sequestration order and § 8-317.

---

10. 6 *Del.C.* § 8-401(2) provides:
"Where an issuer is under a duty to register a transfer of a security the issuer is also liable to the person presenting it for registration or his principal for loss resulting from any unreasonable delay in registration or from failure or refusal to register the transfer."

As to Greyhound's reliance on *Haas*, he said that the conflict there did not involve a sequestration order and UCC priorities, and that defendants remain free to transfer their stock under the order of sequestration and the general practice. Cf. *Trans World Airlines, Inc. v. Hughes Tool Company*, supra.

In this Court Greyhound points to a number of situations in which it might be caught in a legal dilemma and be faced with a claim for loss. These all contemplate a transfer by a defendant in violation of the sequestration order or a claim by a bona fide purchaser who was made so by a defendant under circumstances which violate the order of sequestration.

None of such facts or claimants are before the Court.

We recognize the desirability of quieting fears about the free transferability of shares traded on a national stock exchange but we are not persuaded that that or any other reason advanced by Greyhound provides a basis on which this Court can or should state an opinion. In brief, there is not before us a controversy calling for a judicial judgment, even on a declaratory basis. Accordingly, we decline to decide the issue.

• • •

Affirmed in all respects except as noted in Section V.

IN THE
SUPREME COURT OF THE
STATE OF DELAWARE

—

No. 132, 1975

—

THE GREYHOUND CORPORATION,
R. F. SHAFFER, et al.,
Defendants Below,
Appellants,

v.

ARNOLD HEITNER, as custodian for
MARK ANDREW HEITNER,
Plaintiff Below,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that R. F. Shaffer, J. L. Kerrigan, F. L. Nageotte, Gerald H. Trautman, Bart Cook, R. N. Dick, William E. Hastings, Howard Boyd, H. A. Montague, Rankin M. Smith, Hans Stauffer, Harold C. Stuart, James W. Walker, Leslie B. Worthington, Jess Nicks, Ralph C. Batastini, Robert Minge Brown, David L. Duensing, Charles R. Orem, Clifton B. Cox, and M. H. O'Rourke, the individual defendants below, and individual appellants here, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Delaware, affirming in part the decision of the court below, entered in this action on the 15th day of April, 1976.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ E. N. CARPENTER, II
Edmund N. Carpenter, II
Richards, Layton & Finger
4072 DuPont Building
Wilmington, DE 19899
Attorney for Individual
Defendants-Appellants

William W. Schwarzer
McCutcheon, Doyle, Brown & Enersen
601 California Street
San Francisco, CA 94108

OF COUNSEL

DATED: May 6, 1976

Supreme Court, U. S.
FILED
JUL 14 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1812

R. F. SHAFFER, et al.,

Defendants-Appellants,

—against—

ARNOLD HEITNER, as Custodian for
MARK ANDREW HEITNER,

Plaintiff-Appellee.

ON APPAEL FROM THE SUPREME COURT OF THE
STATE OF DELAWARE

MOTION TO DISMISS AND/OR TO AFFIRM

MICHAEL F. MASCHIO
CAROL FAYE SIMKIN
Attorneys for Appellee

COWAN, LIEBOWITZ & LATMAN, P.C.
200 East 42nd Street
New York, New York 10017

TWILLEY, JONES & FELICEANGELI
26 The Green
Dover, Delaware 19901

JOSHUA M. TWILLEY,
Of Counsel

Counsel Press, 55 West 42nd Street, PE 6-8460

(5568)

INDEX

PAGE

Table of Authorities i

Motion to Dismiss and/or to Affirm 1

Question Presented 1

Addition to Appellants' Statement of the Case 2

ARGUMENT 3

Appellants Raise No Substantial Question and the Decision Below Is Clearly Correct 3

A. This Case Presents an "Extraordinary Situation" 3

B. Pre-Seizure Safeguards are Present 5

C. Post-Seizure Safeguards are Present 6

CONCLUSION 9

TABLE OF AUTHORITIES

Cases:

Boddie v. *Connecticut*, 401 U.S. 371 (1971) 3

Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) 3, 4

Carey v. *Sugar*, —— U.S. ——, 44 L.W. 4416 (March 25, 1976) 7

Fuentes v. *Shevin*, 407 U.S. 67 (1972) 3, 5, 5, 6, 7

Garcia v. *Krausse*, 380 F. Supp. 1254 (S.D. Tex. 1974).. 4, 5

PAGE

Gordon v. *Michel*, 297 A.2d 420 (Del. Ch. 1972) 4, 5

International Shoe Co. v. *Washington*, 326 U.S. 310 (1945) 9

Lebowitz v. *Forbes Leasing & Finance Corp.*, 456 F.2d 979 (3d Cir. 1972) 5

Mitchell v. *W. T. Grant Co.*, 416 U.S. 600 (1974) ..3, 4, 7, 8

North Georgia Finishing, Inc. v. *Di-Chem, Inc.*, 419 U.S. 601 (1975) 3, 4, 7, 8

Ownbey v. *Morgan*, 256 U.S. 94 (1921) 3, 4

Sniadach v. *Family Finance Corp.*, 395 U.S. 337 (1969) 3, 4

Steinberg v. *Shields*, 38 Del. Ch. 319, 152 A. 2d 113 (1959) 6

Trans World Airlines, Inc. v. *Hughes*, 40 Del. Ch. 523, 185 A. 2d 762 (1962) 6

U. S. Industries v. *Gregg*, 348 F. Supp. 1004 (D. Del. 1972); 58 FRD 469 (1973) Memorandum, Opinion and Order (April, 1975) 3, 5, 7, 8

Statutes:

10 Del. C. §366 .....3, 4, 5, 6, 7, 8

Periodicals:

Folk, *Sequestration in Delaware: A Constitutional Analysis*, 73 Colum. L. Rev. 749 (1973) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1812

R. F. SHAFFER, et al.,

Defendants-Appellants,

—against—

ARNOLD HEITNER, as Custodian for MARK ANDREW HEITNER,

Plaintiff-Appellee.

ON APPAEL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

MOTION TO DISMISS AND/OR TO AFFIRM

Appellee in the above entitled case moves to dismiss and/or to affirm on the grounds that the appellants have raised no substantial question and that the decision below is clearly correct.

Question Presented

Does the Delaware sequestration statute, which is invoked to obtain jurisdiction over non-resident present and former officers, directors and/or employees in a Delaware corporation, in order to adjudicate claims against them for misconduct in their corporate capacities for the benefit of the corporation, which authorizes attachment of the appellants' stock without notice and a prior hearing, but

which offers significant safeguards, comport with the due process requirements of the Fourteenth Amendment?

Addition to Appellants' Statement of the Case

In conjunction with plaintiff's verified complaint in which the merits of plaintiff's claim is contained, and in further support of plaintiff's application for an order of sequestration, plaintiff submitted, pursuant to Chancery Rule 4(db), an affidavit specifying:

(a) As to each nonresident defendant whose appearance is sought to be compelled, his last known address or a statement that such address is unknown and cannot with due diligence be ascertained.

(b) The following information as to the property of each such defendant sought to be seized:

(1) A reasonable description thereof.

(2) The estimated amount and value thereof.

(3) The nature of the defendant's title or interest therein; and if such title or interest be equitable in nature, the name of the holder of the legal title.

(4) The source of affiant's information as to any of the items as to which the affidavit is made on information and belief.

(5) The reason for the omission of any of the required statements.

Appellants Raise No Substantial Question and the Decision Below Is Clearly Correct

Recent decisions of this Court[1] make clear that procedures such as 10 Del. C. §366 which sanction the attachment of property without prior notice or hearing meet the due process test if implemented in "extraordinary situations" where sufficient pre-seizure and post-seizure safeguards are present. Plaintiff has ably demonstrated that this case is precisely the kind of "extraordinary situation" contemplated by this Court, and that numerous and sufficient safeguards are available to prevent abuse and to protect the defendants. Therefore, the defendants raise no substantial question and the decision below upholding the statute's validity is clearly correct.[2]

A. *This Case Presents an "Extraordinary Situation"*

At the outset we say that appellants' tortured attempt to beat *Ownbey* v. *Morgan*, 256 U.S. 94 (1921) into the ground as the heart of their appeal is misguided. While some portions of the *Ownbey* opinion might well be written differently today,[3] procedures there under attack go beyond those presented by this case. Nevertheless, the rationale underlying *Ownbey*, namely, a state's vital interest in securing jurisdiction over non-resident debtors, is still very

---

[1] *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

[2] The Delaware statute here being challenged has also recently survived constitutional attack in the Federal Courts. *U.S. Industries* v. *Gregg*, 348 F. Supp. 1004 (D. Del. 1972); 58 F.R.D. 469 (1973); Memorandum Opinion and Order (April 1975).

[3] See *U.S. Industries* v. *Gregg, supra*, 348 F. Supp. at 1021.

much alive and is explicitly consistent with current pronouncements of this Court.[4] In this connection, the Court has twice noted that *Ownbey* was an example of an "extraordinary situation" which justified excusing notice prior to seizure because the facts there required protection to the state: the "attachment [in *Ownbey* was] necessary to secure jurisdiction in state court—clearly a most basic and important public interest". *Fuentes* v. *Shevin, supra,* 407 U.S. at 91, n. 23. No further review of *Ownbey* is called for by the facts of this case.

Quite aside from the current viability of *Ownbey* v. *Morgan, supra,* the provisions of the Delaware sequestration statute fit squarely within the criteria set forth in *Fuentes* v. *Shevin, supra,* for excusing notice prior to seizure. Firstly, in additon to the general public interest illustrated in *Ownbey* which is served by a statute which brings non-resident debtors within the court's jurisdiction, 10 *Del. C.* §366 serves a most important additional public interest—that of centering litigation concerning Delaware corporate law in the Delaware courts, which are in a "unique position to make an authoritative determination of 'housekeeping' issues and to grant complete relief". *Gordon* v. *Michel,* 297 A. 2d 420, 423 (Del. Ch. 1972)[5]

[4] *Fuentes* v. *Shevin,* 407 U.S. 67 (1972) 91 n. 28 (1972); *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337, 339 (1969); *Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600, 613 (1974); *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U.S. 601, 610 (1975) (Powell, J. concurring opinion); *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974). The approval of *Ownbey* in *Fuentes* is underscored by the Court's disapproval, in the same footnote, of another case in which a pre-seizure hearing was excused, as well as by the reference to *Ownbey* by Mr. Justice Brennan in his opinion in *Calero-Toledo* v. *Pearson, supra,* 416 U.S. 663, 681, n. 13, where the Court upheld a seizure prior to notice which formed the basis for the assertion of *in rem* jurisdiction. 416 U.S. at 679 n. 13.

[5] The procedure here under attack is, in fact, most commonly implemented in stockholder and derivative actions. This case must therefore be distinguished from a situation where the claims asserted and the parties involved have no relationship with the forum. *Gordon* v. *Michel, supra,* at 421; Folk, *Sequestration in Delaware: A Constitutional Analysis,* 73 Colum. L. Rev. 749 (1973). Thus, while plaintiff here is an individual stockholder, he sues "for all others similarly situated" as contrasted with the plaintiff's claim in *Fuentes* v. *Shevin* where "no more than [a] private gain" was at stake. *U.S. Industries* v. *Gregg, supra; cf. Fuentes* v. *Shevin, supra.* In addition, the appellants are either present or former officers, directors and/or employees of the Delaware corporate defendant. They have directly participated in the wrongful conduct set forth in the pleadings, they have invoked the benefits of the Delaware laws, and are hardly foreigners to the State of Delaware.

B. *Pre-Seizure Safeguards are Present*

Secondly, unlike the statute invalidated in *Fuentes* v. *Shevin, supra,* where a clerk issued the order of seizure, 10 *Del. C.* §366 provides significant pre-seizure safeguards to protect against abuse. As stated by Vice Chancellor Brown, at A31:

> "The attachment powers of the state are not set in motion at the whim of the litigant. They are activated only by an order of this Court after it is satisfied that the plaintiff has demonstrated his right to invoke the sequestration statute so as to obtain jurisdiction over the non-resident defendant in an effort to get the merits of his case before the Court".

Before the Judge for consideration must be a verified complaint, see *Lebowitz* v. *Forbes Leasing & Finance Corp.,* 456 F. 2d 979, 981 (3d Cir. 1972), and an affidavit submitted by the plaintiff. These must contain the facts of plaintiff's claim against defendants, the fact of defendants' nonresidence, the facts concerning defendants' ownership of property in Delaware and the value of that property, and the

source of plaintiff's information[6]. This information supplies the court with a sufficient basis on which to determine whether the seizure complies with the tests already discussed, and hardly leaves the state "in the dark". See *Fuentes* v. *Shevin, supra,* at 93. As noted in *U.S. Industries* v. *Gregg, supra,* at 1022 n. 29:

> "Under the Delaware practice, a court presented with a motion for the issuance of a sequestration order may also determine from the complaint whether it is 'bona fide on its face', *Trans World Airlines, Inc.* v. *Hughes,* 40 Del. Ch. 552, 185 A. 2d 886 (1972), whether the action is of a kind where the exercise of *quasi in rem* jurisdiction is appropriate, *Steinberg* v. *Shields,* 38 Del. Ch. 319, 152 A. 2d 113 (1959), and whether the value of the Property to be seized bears a reasonable relation to the amount of the claim asserted. *Trans World Airlines, Inc.* v. *Hughes,* 40 Del. Ch. 523, 185 A. 2d 762, 765 (1962)".[7]

C. *Post-Seizure Safeguards are Present*

Appellants maintain, in addition to the lack of pre-seizure safeguards, that recent cases dictate that Delaware's sequestration statute be held unconstitutional for

[6] 10 Del. C. §366 also requires the plaintiff to post a bond to protect the sequestrator from damages due to wrongful sequestration. This provision adds an extra measure of safety to the more significant controls already noted.

[7] In *Fuentes, supra,* the Supreme Court indicated that any requirement that the plaintiff must put forth ex parte evidence in addition to the allegations in the complaint would provide only "illusory" protection to a defendant in that such evidence would not be subject to dispute by the defendant. To permit a contest on the merits prior to seizure would give the defendant an opportunity to transfer the property and thus frustrate jurisdiction. Thus 10 Del. C. 366 satisfies the remaining test set forth in *Fuentes,* namely, that the seizure will satisfy the need for prompt action.

lack of an immediate post-seizure hearing. *North Georgia Finishing, supra,* and *Garcia* v. *Krausse,* 380 F. Supp. 1254 (S.D. Tex. 1974). However, the requirement of an immediate post-seizure hearing is altogether inapplicable where sequestration is invoked solely to accomplish the valid governmental purpose of obtaining jurisdiction over non-resident defendants. The Court has, in the cases referred to by appellants, hand-tailored[8] the requirement of an immediate post-seizure hearing to prevent against any "initial error",[9] *North Georgia Finishing Co., Inc., supra,* at 608, in prematurely depriving a debtor (who is already within the Court's jurisdiction) of his property during the pendency of an action where his creditor's grounds are weak[10] that he is about to consume the property, abscond or otherwise frustrate the creditor's ultimate judg-

[8] Indeed, in *North Georgia Finishing* v. *Di-Chem, supra,* Justice Powell indicates in his concurring opinion, at 610, note 1, that the majority in that case (and perhaps in all related cases) was not directing its attention to sequestration which is designed to serve a jurisdictional functon and thus, was not passing on the required controls in such a case.

[9] With respect to 10 *Del. C.* §366 (which in this case is not invoked on the basis of any facts peculiar to the defendants which need to be proven), no such "initial error" is possible. *U.S. Industries* v. *Gregg, supra,* Memorandum Opinion and Order. This is because the sole reason for implementation of Delaware's sequestration statute in this case is to obtain jurisdiction over non-resident defendants and therefore, its usage "is not dependent upon the merits of the complaint as was true in *Fuentes* and *Mitchell*". (Opinion of Vice Chancellor Brown, A31). Rather, the sole relevant facts in moving for an order of sequestration are defendants' nonresidence and their ownership of property within the state. The only possible "initial error", therefore, is that plaintiff is incorrect in asserting that defendants are non-residents and that they own property within the state. However, as previously noted, sufficient safeguards are present prior to seizure to assure that these determinations are not left to the plaintiff.

[10] Where plaintiff's allegations of fraud are merely on information and belief, for example. See, *Carey* v. *Sugar, et al.,* —— U.S. ——, 44 L.W. 4416 (Mar. 25 1976).

ment. However, such a hearing would serve no purpose here where release of the defendants' property[11] is obtainable merely through defendants' appearance.[12]

The argument that Delaware's sequestration statute is unconstitutional because it lacks an immediate post-seizure hearing has recently been examined and rejected. Judge Stapleton, who wrote the original opinions in *U.S. Industries* v. *Gregg, supra,* which upheld the constitutionality of 10 *Del. C.* §366, was asked to reconsider his earlier opinion in light of *North Georgia Finishing, supra,* and *Garcia, supra.* He accepted the invitation to reconsider, but declined to reverse his opinion. Judge Stapleton agreed with appellee herein that a post-seizure hearing would serve no purpose.[13] While a post-seizure hearing of the type requested by appellants is not available, other ample procedures are available to protect the appellants, and these are set out by the Court below at A13-A17 and clearly provide a reasonable balancing of interests between these appellants and appellee.[14]

---

[11] The make weight arguments raised concerning lack of jurisdiction over the appellants' stock certificates which are physically located outside Delaware are amply answered by the courts below. See A20-A21 and A27-A30.

[12] As soon as defendants appear they may immediately petition the Court for a release of their property, which will automatically be granted absent a showing by the plaintiff for a reason for continuation of the sequestration order.

[13] As noted in the opinion below, a form of post-seizure hearing is available upon appellants' petition for release at which time the merits of appellee's claims are examined. See A17-A18.

[14] See *Mitchell, supra.* This is so particularly in light of the need to encourage rather than discourage actions which seek to redress wrongs by those in control of corporate affairs. The need to balance appellee's need of access to a ready means of adjudicating its claims referred to above in one forum cannot be ignored. In other words, if the statute involved in this case is held invalid, stockholder and derivative actions will be for all practical purposes impossible to bring and thus appellee and others similarly situated will effectively be denied their right to a day in court. The suggestion by appellants that plaintiff be bound by the minimum contacts doctrine enunciated in *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), rather than avail itself of the remedies afforded under the sequestration statute, is nothing more than an attempt to utterly frustrate plaintiff's access to a forum.

CONCLUSION

Accordingly, appellee contends that the appellants raise no substantial question and that the decision below is clearly correct. The Delaware Supreme Court has followed guidelines recently set by this Court and has, in addition, applied those guidelines with a sense of proportion to balance the particular type of competing interests involved in a case such as this. Therefore, appellee respectfully prays that its motion to dismiss and/or to affirm be granted.

MICHAEL F. MASCHIO
CAROL FAYE SIMKIN
Attorneys for Appellee

COWAN, LIEBOWITZ & LATMAN, P.C.
200 East 42nd Street
New York, New York 10017

TWILLEY, JONES & FELICEANGELI
26 The Green
Dover, Delaware 19901

JOSHUA M. TWILLEY,
Of Counsel

Supreme Court, U. S.
FILED
AUG 2 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

No. 75-1812.

R. F. SHAFFER, et al.,

Appellants,

v.

ARNOLD HEITNER, as Custodian for MARK ANDREW HEITNER,

Appellee.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS AND/OR TO AFFIRM.

On Appeal From the Supreme Court of the State of Delaware.

RICHARDS, LAYTON & FINGER,
4072 DuPont Building,
Wilmington, Delaware. 19801

EDMUND N. CARPENTER, II,
R. FRANKLIN BALOTTI,

McCUTCHEN, DOYLE, BROWN & ENERSEN,
601 California Street,
San Francisco, California. 94108

JOHN R. REESE,

Attorneys for Appellants.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX TO BRIEF.

	Page
INTRODUCTION	1
I. The Sequestration Procedure Cannot Be Used as a Device to Circumvent the Constitutional Requirements for Asserting in Personam Jurisdiction	2
II. The Sequestration Procedure Has Deprived Appellants of Their Property Without Due Process of Law	3
A. This Is Not an Extraordinary Situation	3
B. There Are No Pre-Seizure Safeguards	6
C. There are No Post-Seizure Safeguards	7
III. The Sequestration Procedure Is Not a Valid Exercise of Quasi in Rem Jurisdiction	8
CONCLUSION	9
Exhibit A:	
Opinion in the case of U. S. Industries, Inc., et al. v. Gregg (USCA(3) No. 75-2177) filed July 19, 1976	1
Judgment in the same case	31

TABLE OF CITATIONS.

Cases:	Page
Breech v. Hughes Tool Co., 41 Del. Ch. 128, 189 A. 2d 428 (Sup. Ct. 1963)	7
Fuentes v. Shevin, 407 U. S. 67 (1972)	3, 4, 5
Hanson v. Denckla, 357 U. S. 235 (1958)	2
International Shoe Co. v. Washington, 326 U. S. 310 (1945)	2
Jonnet v. Dollar Sav. Bank, 530 F. 2d 1123 (3rd Cir. 1976)	4
North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U. S. 601 (1975)	3, 6
Ownbey v. Morgan, 256 U. S. 94 (1921)	4
Sniadach v. Family Finance Corp., 395 U. S. 337 (1969)	3
U. S. Industries, Inc. v. Gregg, – F. 2d – (3rd Cir. July 19, 1976)	1, 2, 4, 8, 9
U. S. Industries, Inc. v. Gregg, 348 F. Supp. 1004 (D. Del. 1972); 53 F. R. D. 469 (1973)	1

INTRODUCTION.

The opinion of the Delaware Supreme Court upholding the constitutionality of the Delaware sequestration statute and appellee's motion to dismiss or affirm both relied heavily upon the federal district court decision in *U. S. Industries, Inc. v. Gregg*, 348 F. Supp. 1004 (D. Del. 1972); 53 F. R. D. 469 (1973). On July 19, 1976, the Court of Appeals for the Third Circuit reversed that decision and held the Delaware sequestration statute unconstitutional in the absence of the minimum contacts required by due process. *U. S. Industries, Inc. v. Gregg*, – F. 2d – (3rd Cir. July 19, 1976).[1] The Court of Appeals considered and explicitly rejected the decision of the Delaware Supreme Court that is the subject of this appeal.

> "We are persuaded that the cryptic conclusion of the Delaware Supreme Court . . . cannot survive detailed critical analysis." (Ex. A, p. 15, slip opinion, p. 18).

The square conflict between the Third Circuit decision in *U. S. Industries* and the decision below leaves no doubt that this appeal does present substantial federal questions which this Court should decide on their merits. Moreover, the Third Circuit's reasoning fully confirms the demonstration in appellants' Jurisdictional Statement that the application of the Delaware sequestration statute to them is unconstitutional. Of course, the decision in *U. S. Industries* rests upon only one of several constitutional defects in the Delaware sequestration statute that were pointed out in the Jurisdictional Statement. Appellee's motion to dismiss or affirm largely ignores those defects. To the extent it does address them, it only brings them into sharper focus and underscores the compelling need for this Court to note probable jurisdiction and decide the case on the merits.

---

1. The opinion of the Third Circuit is reproduced in full in Exhibit A hereto.

I.

THE SEQUESTRATION PROCEDURE CANNOT BE USED AS A DEVICE TO CIRCUMVENT THE CONSTITUTIONAL REQUIREMENTS FOR ASSERTING IN PERSONAM JURISDICTION.

Appellee openly concedes that the sole reason for the seizure of appellants' property without notice or hearing or opportunity to defend is to coerce them to surrender their constitutional rights and submit to *in personam* jurisdiction in Delaware. (Motion, p. 7, n. 9).[2] To assert *in personam* jurisdiction, the due process requirements of *International Shoe Co. v. Washington,* 326 U. S. 310 (1945), and *Hanson v. Denckla,* 357 U. S. 235 (1958), must be satisfied. *U. S. Industries, Inc., supra.*

The Third Circuit's careful opinion in *U. S. Industries* is squarely on point and squarely contrary to the decision below. The court reviewed the background and development of both *quasi in rem* and *in personam* jurisdiction and concluded that the minimum contacts required by *International Shoe* and *Hanson* must be satisfied whether the jurisdiction asserted is labeled *quasi in rem* or *in personam.* (Ex. A, pp. 24-26).

> "Our conclusion also severely erodes the foundation of the Delaware Supreme Court's truncated analysis in *Greyhound Corp.* that *International Shoe* did not apply because 'jurisdiction under § 366 remains, as it was in 1963, *quasi in rem* founded on the presence of capital stock here.' Slip Opinion at 7. Far from ending the constitutional inquiry, we believe that the *quasi in rem* character of the jurisdiction constitutes

2. Appellee's Motion to Dismiss and/or Affirm is cited herein as "Motion." Appellants' Jurisdictional Statement is cited as "Jur. S."

> the analytical beginning point for the application of constitutional precepts to the case." (Ex. A, pp. 25-26).

The Jurisdictional Statement made the same argument and went on to show that the minimum contacts requirement cannot be satisfied in this case. (Jur. S., pp. 12-13). Appellee's only response is to claim that to force him to meet constitutional due process requirements would "frustrate plaintiff's access to a forum." (Motion, p. 9, n. 14). Perhaps. That, of course, is true whenever a court declines jurisdiction. But appellee's frustration cannot override Constitutional rights.

II.

THE SEQUESTRATION PROCEDURE HAS DEPRIVED APPELLANTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

Appellants' Jurisdictional Statement also demonstrates that Delaware's seizure of appellants' property without hearing or opportunity to defend and without regard to the merits of the alleged claim cannot be squared with the Constitution or with the Court's decisions in *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U. S. 601 (1975), *Fuentes v. Shevin,* 407 U. S. 67 (1972), and *Sniadach v. Family Finance Corp.,* 395 U. S. 337 (1969).

Appellee agrees that the seizure of property without notice or hearing is unconstitutional unless he can show both that the situation is "extraordinary" and that there are sufficient other safeguards to satisfy due process. His motion, however, fails to show either.

A. This Is Not an Extraordinary Situation.

Crucial to appellee's position that the Delaware sequestration statute presents an extraordinary situation is the

assumption that the musty reasoning of *Ownbey v. Morgan*, 256 U. S. 94 (1921), can withstand the light of *Fuentes* and its progeny. As demonstrated in the Jurisdictional Statement, it cannot. Nevertheless, *Ownbey* is a continuing source of controversy and confusion which this Court should end by deciding this appeal on its merits (Jur. S., pp. 6-11).

Appellee, in monumental understatement, allows that "some portions of the *Ownbey* opinion might well be written differently today," but argues that *Ownbey* is still "very much alive" by reason of the Court's references to it in *Fuentes* and *Sniadach* (Motion, pp. 3-4). This optimistic diagnosis of *Ownbey*, based on two references by the Court, will not stand analysis. See *U. S. Industries, Inc. v. Gregg, supra* (Ex. A, pp. 19-22). See also Jur. S., pp. 9-10. More important to the issue immediately before the Court—whether to note probable jurisdiction—appellee's diagnosis is hotly disputed. The Court's ambiguous, passing references to *Ownbey* have not satisfied anyone of its status, and the case continues to generate controversy and uncertainty.[3] It is time for the Court to deal with *Ownbey* directly.

The Jurisdictional Statement also demonstrates that while a state may have an important public interest in enabling its residents to obtain relief against nonresident debtors, the Delaware sequestration statute is not limited to serving that interest.[4] It is available to nonresident

3. For example, uncertainty about *Ownbey* permeates both the Delaware Supreme Court's decision upholding a seizure of Appellants' property in this case, and the recent decisions of the Third Circuit striking down seizures in *Jonnet v. Dollar Sav. Bank*, 530 F. 2d 1123 (3rd Cir. 1976) and *U. S. Industries, Inc. v. Gregg, supra* (Ex. A, pp. 19-22). See also Jur. S., pp. 6-11.

4. It also demonstrated that the sequestration statute is not necessary to serve that interest; long-arm statutes serve it well (Jur. S., p. 11). Appellee's statement that to invalidate the sequestration statute would make derivative actions "for all practical purposes impossible to bring" is absurd (Motion, p. 9, n. 14). In any event, it is no answer to what the Constitution requires.

plaintiffs against nonresident defendants on claims having no relationship whatever to Delaware (Jur. S., pp. 10-11). The sweep of the statute is apparent from appellee's own description of it:

> ". . . [T]he sole relevant facts in moving for an order of sequestration are defendants' nonresidence and their ownership of property within the state." (Motion, p. 7, n. 9).

Those facts simply do not limit sequestration seizures to "extraordinary" or "truly unusual" situations in which Delaware has an interest. See *Fuentes v. Shevin*, 407 U. S. at 30.

Appellee offers no answer except his unsupported assertion that sequestration is most commonly implemented in stockholder suits, that this case involves a Delaware corporation and its present or former directors or officers, and that there is a public interest in centering such cases in Delaware (Motion, pp. 4-5). Appellants do not disagree with this proposition, but we do insist the objective can and must be achieved in a constitutional manner, such as by a valid long-arm statute recognizing the need for minimum contracts and not by unconstitutional means, such as Delaware's sequestration process.

Moreover, there are several defects in appellee's argument. First, the purported public interest, such as it is, in a purely private dispute certainly does not constitute a "truly unusual" situation that would justify displacing the notice and hearing required by the Constitution (Jur. S., pp. 21-22). Second, sequestration does not really serve that interest, and appellee's suggestion that sequestration enables the court to bring all the parties before it and grant complete relief (Motion, p. 4), is not true. Sequestration reaches only those directors and officers un-

lucky enough to own property in Delaware. Third, the argument is false in fact; this case does not simply involve officers and directors of a Delaware corporation. As appellee's amended complaint accurately alleges, some of the appellants here were officers or directors only of a California corporation. They are not and never have been officers or directors of a Delaware corporation, and therefore none of appellee's arguments apply to them. Their only connection with Delaware is that they own stock in a corporation which happens to be incorporated in Delaware. Contrary to appellee's statement (Motion, p. 5, n. 5), they *have not* invoked the benefits of Delaware laws and they *are* foreigners to the state. If the Delaware sequestration statute can be applied to them, it can be applied to any nonresident widow who holds stock in any Delaware corporation on any equitable claim that any plaintiff decides to assert in Delaware.

B. There Are No Pre-Seizure Safeguards.

Appellee states that even without notice or hearing there are adequate pre-seizure safeguards because the sequestration order is issued by a judge upon a verified complaint and affidavit.[5] (Motion, pp. 5-6). In fact, Delaware maintains no meaningful control over the process of seizure; the use of a judge rather than a clerk to sign the sequestration order provides no safeguards at all (Jur. S., pp. 17-18). As the Jurisdictional Statement shows, and appellee does not deny, if the application is sound on its face, the judge *must* issue it because as appellee says, it "'is not dependent upon the merits of the complaint,' . . .

5. Appellee's statement that the complaint must be verified (Motion, p. 5) is simply false. The statute contains no such requirement and there is no other provision which would ensure that the plaintiff set forth the merits of his claim under oath. Cf, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. 601, 607 (1975).

the sole relevant facts . . . are defendants' non-residence and their ownership of property within the state." (Motion, p. 7, n. 9). *Breech v. Hughes Tool Co.*, 41 Del. Ch. 128, 189 A. 2d 428 (Sup. Ct. 1963).

C. There Are No Post-Seizure Safeguards.

Appellee's argument on this subject consists almost entirely of an effort to excuse the lack of any post-seizure hearing by which appellants could contest the deprivation of their property (Motion, pp. 6-8). He argues that no hearing is required because the seizure is to obtain jurisdiction rather than to secure an eventual judgment. But the fact that appellee had an ulterior purpose for depriving appellants of their property does not soften the impact of the deprivation. Their property has been taken from them, and Delaware allows them only one way to recover it—by relinquishing their due process rights and submitting themselves and all their assets to the jurisdiction of the Delaware courts. Appellee's suggestion that that option excuses the requirement for a hearing to guard against wrongful seizure mocks the Constitution (Motion, p. 8; pp. 2-3 above; Jur. S., pp. 5-6).[6]

The Jurisdictional Statement fully demonstrates that there are no other meaningful safeguards (Jur. S., pp. 16-21). That demonstration stands unanswered.

6. Appellee says that no post-seizure hearing is required because no "initial error" is possible (Motion, p. 7, n. 9). That is a remarkable argument. If it is true that no "initial error" is possible, it is true only because the statute is *so* defective it does not even contain the procedure that could lead to "initial error," since it does not contemplate any consideration of the merits of the complaint.

III.

THE SEQUESTRATION PROCEDURE IS NOT A VALID EXERCISE OF QUASI IN REM JURISDICTION.

The Jurisdictional Statement also demonstrates that even if the concededly *in personam* jurisdiction purpose of the seizure in this case could be ignored, the statute cannot be sustained as an attempt to assert *quasi in rem* jurisdiction because: (1) there is no property in Delaware on which to base such jurisdiction; and (2) Delaware affords appellants no opportunity to appear and defend their property unless they submit to unlimited personal jurisdiction (Jur. S., pp. 14-16). Having admitted that sequestration in Delaware is really a device for acquiring *in personam* jurisdiction, Appellee essentially ignores those points, and they remain unanswered (See Motion, p. 8, n. 11). Indeed they are given new force by the decision in *U. S. Industries:*

> "Keeping in mind the admonition of *Mullane* that constitutional standards do not depend on 'elusive and confused' state law classifications, we wonder whether this jurisdiction realistically ought to be considered as *quasi in rem*. The purpose of the Delaware procedure is to coerce the nonresident to submit to *in personam* jurisdiction. And it is difficult to conceive of a more potent jurisdiction—irrespective of its label—then the jurisdiction exercised here. Unless Gregg chose to default the $2 million in stock certificates he could have been held personally to answer for a claim in excess of $20 million in a forum unrelated to him or the transaction at issue. Of course, if this case were analyzed under an *in personam* rubric, the conclusion we have reached would follow just as surely." *U. S. Industries, Inc. v. Gregg, supra* (Ex. A, p. 29, slip opinion, pp. 32-33).

Thus, the seizure of Appellants' property in this case cannot be justified as an exercise of either *in personam* or *quasi in rem* jurisdiction.

CONCLUSION.

The decision below presents serious and important constitutional questions that should be answered by this Court. The state and federal courts are now in square conflict as to the constitutionality of the Delaware sequestration statute. If this Court does not resolve the conflict, constitutional rights will be subject to forum shopping. Appellants respectfully request the Court to deny the motion to dismiss and/or affirm and to note probable jurisdiction.

Respectfully submitted,

EDMUND N. CARPENTER, II
R. FRANKLIN BALOTTI
RICHARDS, LAYTON & FINGER

JOHN R. REESE
McCUTCHEN, DOYLE, BROWN & ENERSEN

Attorneys for Appellants.

Dated: August 2, 1976.

Exhibit A, page 1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2177

U.S. INDUSTRIES, INC., a corporation, and DIVERSACON INDUSTRIES, INC., a corporation

v.

F. BROWNE GREGG,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

(D.C. Civil No. 4431)

Argued April 20, 1976

Before: ALDISERT, KALODNER and WEIS, *Circuit Judges.*

Thomas S. Lodge, Esq.
Connolly, Bove & Lodge
1800 Farmers Bank Building
Wilmington, Delaware 19899

Of Counsel:

E. Earle Zehmer, Esq.
Bedell, Bedell, Dittmar & Zehmer
1500 Barnett Bank Building
Jacksonville, Florida 32202

Counsel for Appellant

Morris, Nichols, Arsht & Tunnell
David A. Drexler, Esq.
1105 North Market Street
Wilmington, Delaware 19899

Of Counsel:

William F. Sondericker, Esq.
Judith S. Kaye, Esq.
Olwine, Connelly, Chase, O'Donnell
& Weyher
299 Park Avenue
New York, New York 10017

Counsel for Appellee

OPINION OF THE COURT

(Filed July 19, 1976)

ALDISERT, *Circuit Judge.*

Unlike 49 other states that enacted the Uniform Commercial Code, Delaware did not enact § 8-317(1) [1] which requires the actual seizure of stock certificates to effect a valid attachment or levy upon an interest in corporate stock. Rather, Delaware continued in force § 169 [2] of its General Corporation Law which provides that the situs of ownership of stock in a Delaware corporation is Delaware

1. § *8-317. Attachment or Levy Upon Security*

(1) No attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy but a security which has been surrendered to the issuer may be attached or levied upon at the source.

2. *8 Del. C. § 169. Situs of ownership of stock.*

For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State. (8 Del. C. 1953, § 169; 56 Del. Laws, c. 50.)

—regardless of the actual location of the stock certificates. In contrast to the Uniform Commercial Code procedure, Delaware nonresident sequestration [3] practice permits the "seizure" of a defendant's stock interest in a domestic corporation merely by giving notice to the corporation in Delaware. Seizure having been effected, Delaware case law establishes that the defendant may not appear specially to protect the seized property without subjecting himself to full *in personam* liability. *Sands v. Lefcourt Realty Corp.*, 35 Del. Ch. 340, 117 A.2d 365 (1955). The major question presented in this appeal from a default judgment approving the sale of defendant's interest in the shares of a Delaware corporation is whether the Delaware situs statute, as construed by the Delaware courts and as applied in this

3. *10 Del. C. § 366. Compelling appearance of nonresident defendant.*

(a) If it appears in any complaint filed in the court of Chancery that the defendant or any one or more of the defendants is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such nonresident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for 3 consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

(b) The Court may make all necessary rules respecting the form of process, the manner of issuance and return thereof, the

sequestration proceeding, comports with the constitutional requirement that jurisdiction be predicated on minimum contacts with the forum. *International Shoe Co. v. Washington,* 326 U.S. 310 (1945). In our view, it does not so comport. Accordingly, we reverse and remand with a direction to dismiss for want of jurisdiction over the person.

I.

The issue is sharply drawn in this litigation initiated by U.S. Industries, Inc. (USI), a Delaware corporation having its principal place of business in New York, and its wholly-owned subsidiary, Diversacon Industries, Inc., a Florida corporation having its principal place of business in Florida. The sole defendant is F. Browne Gregg, a Florida citizen and resident. In 1969 Gregg and USI entered into an agreement in Florida for the sale of three Florida construction companies controlled by Gregg. In essence, USI agreed to exchange USI voting common and special preference stock for the outstanding stock of the Gregg companies, the business of those companies to be transferred to USI's subsidiary, Diversacon. In addition to transferring the stock and business of his corporations, Gregg contributed $1 million to the capital of the transferred corporations and, with his wife, gave a $500,000

3. (Cont'd.)
release of such property from seizure and for the sale of the property so seized, and may require the plaintiff to give approved security to abide any order of the Court respecting the property.

(c) Any transfer or assignment of the property so seized after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized and sold and such sale and confirmation shall transfer to the purchaser all the right, title and interest of the defendant in and to the property as fully as if the defendant had transferred the same to the purchaser in accordance with law. (Code 1852, § 1938; 17 Del. Laws, c. 215; Code 1915, § 3850; 34 Del. Laws, c. 216, § 2; 35 Del. Laws, c. 217; 36 Del. Laws, c. 268, § 1; Code 1935, § 4374; 10 Del. C. 1953, § 366; 50 Del. Laws, c. 379, § 1.)

installment note to Diversacon. In return, Gregg received 100,962 shares of USI common stock and 8,750 shares of USI special preference stock; he was to receive additional common stock if Diversacon achieved specified levels of profitability in the future. Gregg also received an employment contract to serve as president of the transferred businesses until 1973. Gregg was removed as president in 1971 following disagreements about the operations and profitability of the acquired companies. In 1972, USI (and Diversacon as a nominal plaintiff) filed an eight-count complaint against Gregg in Delaware Chancery Court claiming damages in excess of $20 million in connection with the sale.

To obtain jurisdiction over Gregg, a nonresident, plaintiffs moved *ex parte* for an order of sequestration under 10 Del. C. § 366 to seize Gregg's property in Delaware. His only property in Delaware consisted of the USI shares he had obtained in exchange for his Florida businesses. Though physically the certificates were in the First National Bank of Leesburg, Florida, where Gregg had pledged them as security for a loan, appellee contends the shares were property in Delaware because of USI's Delaware incorporation and the situs rule of 8 Del. C. § 169. Plaintiffs filed a bond in the sum of $1,000 and the state court issued the order of sequestration, the sequestrator seizing the shares by formally notifying USI of the order. The First National Bank of Leesburg then moved to intervene and quash the sequestration claiming that it owned the whole of the interest in the shares by virtue of the pledge and that Gregg had no interest to sequester. At this point, and before further action by the Delaware court, Gregg removed the case to federal court based upon diversity and $10,000 in controversy.

The proceedings in the district court were not cursory: Gregg removed the action in July, 1972, and final judgment was ordered in August, 1975. For present purposes, however, we need not trace the intricate history of the litiga-

tion below.[4] Gregg raised objections to the sequestration which were rejected, and he sought interlocutory review which was denied. Knowing he would be subject to *in personam* liability if he answered the complaint, *Sands v. Lefcourt Realty Corp., supra,* Gregg did not answer. Issues concerning damages, valuation of the stock, and the prior lien of the bank were resolved. Eventually, Gregg's stock was sold in satisfaction of the *quasi in rem* judgment of default entered against him. He appeals from the default judgment, raising four issues:

1. Whether a nonresident defendant has a sequestrable interest in Delaware corporate stock where the negotiable stock certificates have been pledged and delivered by him to a bank located outside Delaware and the defendant holds only a contingent right to the return of the certificates if and when the loan is paid in full?

2. Whether the seizure of Gregg's stock to compel his personal appearance to answer damage claims unrelated to Delaware and unrelated to his rights in the stock deprived him of due process because of the absence of minimum contacts with Delaware to sustain jurisdiction? *Hanson v. Denckla,* 357 U.S. 235 (1958); *International Shoe Co. v. Washington,* 326 U.S. 310 (1945).

3. Whether the Delaware procedure for seizure of Gregg's stock without a pre-seizure adversary hearing deprived him of due process and equal protection rights? *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U.S. 601 (1975); *Mitchell v. W. T. Grant Co.,* 416 U.S. 600 (1974); *Fuentes v. Shevin,* 407 U.S. 67 (1972).

4. Whether the denial of an opportunity to make a limited appearance, defending plaintiff's claim on the merits with any judgment limited to the value of the seized property, deprived Gregg of due process?

---

4. Decisions of the district court are reported at 348 F. Supp. 1004 (D. Del. 1972) and 58 F.R.D. 469 (D. Del. 1973).

II.

We turn first to the non-constitutional argument. The district court found, and we agree:

> The sequestration order was served upon USI on or about June 19, 1972. The stock was then registered in the name of Gregg. As of July 27, 1972, the collateral was valued by the Bank at $2,066,333.62.
>
> The loan transaction was negotiated and closed in Florida. The law of Florida determines the nature and extent of Gregg's interest, if any, in the stock. The law of Delaware controls the question of whether any such interest may be sequestered under 10 Del. C. § 366. Cheff v. Athlone Industries, Inc., 233 A.2d 170 (Del. Sup. Ct. 1967); Nickson v. Filtrol Corporation, 265 A.2d 425 (Del. Ch. 1970).
>
> An examination of Florida law reveals that Gregg had not transferred his entire interest in the stock to the Bank at the time of sequestration. The rights retained under Article 9 of Florida's Uniform Commercial Code by a debtor who has conveyed a security interest in collateral apply "whether title to collateral is in the secured party or in the debtor." 19C Fla. Stat. Ann. § 679.9-202 (West 1966). These rights include the right of return of the collateral upon fulfillment of the debtor's obligations. *Id.* § 679.9-506. This right is expressly recognized in the Gregg note; it is, in any event, unwaivable. *Id.* § 679.9-501.
>
> The rights reserved to the debtor under Article 9 are rights in the collateral itself and may be transferred voluntarily or involuntarily. *Id.* § 679.9-311 provides:
>
> > "The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement

> prohibiting any transfer or making the transfer constitute a default."

348 F. Supp. 1004, 1016 (D. Del. 1972) (footnote omitted).

Having decided that Florida law determines the nature of Gregg's interest in the securities pledged to the bank, and having decided further that under Florida law Gregg had not transferred his entire interest in the stock at the time of the sequestration, the question is whether Delaware law would permit the sequestration of Gregg's interest. The district court found that Delaware law would so permit. We agree.

Our starting point is 10 Del. C. § 366 which provides that the "Court may compel the appearance of the defendant by the seizure of all or any part of his property." The word "property" has been construed by Delaware courts as having a "broad and comprehensive meaning, including legal and equitable interests in both real and personal property." *Blumenthal v. Blumenthal,* 28 Del. Ch. 1, 35 A.2d 831, 836 (Ch. 1944), *aff'd* 28 Del. Ch. 448, 59 A.2d 216 (Sup. Ct. 1945); *Sands v. Lefcourt Realty Corp., supra.* That an interest is contingent does not make it non-sequestrable. *Weinress v. Bland,* 31 Del. Ch. 269, 71 A.2d 59 (Ch. 1950).

The district court concluded that the bank merely had a security interest in Gregg's USI stock—valued at over $2 million at the time of seizure—securing a demand note of $1.5 million. Gregg had at least two identifiable interests in the pledged stock: (a) an equitable interest in the amount by which the stock value exceeded the debt, and (b) an absolute right to discharge the bank's lien upon payment of the debt.

We agree with the district court's summary:

> . . . Delaware courts, confronted with questions of whether interests in stock were sequesterable, have asked whether the specified interest was cognizable at law or equity, whether it was susceptible of sufficient identification to permit seizure, and whether it was saleable. Blumenthal v. Blumenthal, *supra;* Greene v. Johnston, 34 Del. Ch. 115, 99 A.2d 627 (Sup. Ct. 1953). Here Gregg's interest is so cognizable, so identifiable and so alienable. Accordingly, I conclude that it is sequesterable.

348 F. Supp. at 1017.

The Delaware cases urged upon us by Gregg do not fault the reasoning of the district court nor dilute the soundness of its conclusion. Four of these were cases where an effort was made to seize property held by a legal entity in which the defendant had some interest. *Winitz v. Kline,* 288 A.2d 456 (Del. Ch. 1971) (voting trust); *Nickson v. Filtrol Corp.,* 265 A.2d 425 (Del. Ch. 1970) (trust); *Cheff v. Athlone Industries, Inc.,* 233 A.2d 170 (Del. Sup. Ct. 1967) (estate); *Buechner v. Farbenfabriken Bayer Aktiengesellschaft,* 38 Del. Ch. 490, 154 A.2d 684 (Sup. Ct. 1959) (subsidiary corporation). Seizure was denied in all cases, the Delaware courts having regard for the separate existence of the legal entity and the rights of its creditors and beneficiaries not involved in the litigation. The fifth case, *K-M Auto Supply, Inc. v. Reno,* 236 A.2d 706 (Del. Sup. Ct. 1967) involved an attempt to attach a client's funds held by an attorney in escrow for a third party, and attachment was vacated on the ground that the client-defendant no longer had an attachable interest. We see only the most remote factual parallels between these cases and the case *sub judice,* and we perceive fundamental legal distinctions. Having in mind particularly that the interest of the third-party bank here was fully protected, we discern no reason why these cases require the conclusion that Gregg had no sequestrable interest.

We are satisfied that under Florida law Gregg had not relinquished his entire interest in the shares and that under Delaware law he possessed sequestrable "property" within the meaning of § 366.

III.

We turn now to the first of Gregg's constitutional arguments: that there are no minimum contacts with Delaware upon which to predicate jurisdiction in that state. USI and Diversacon have no contacts with Delaware except for USI's incorporation in the state. The transactions giving rise to the litigation did not take place in Delaware. Gregg is not a Delaware resident, he conducts no business in that state, and he owns no property physically located there. His only contact arises by virtue of the provision of 8 Del. C. § 169 that the situs of his USI shares is Delaware. This is the *sole* nexus upon which Delaware can predicate its jurisdiction to adjudicate Gregg's rights and this, Gregg argues, is too fragile a connection to satisfy constitutional requirements.

Gregg relies upon the Supreme Court's classic formulations of the constitutional limits to state court jurisdiction.

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Milliken v. Meyer,* 311 U.S. 457, 463.
>
> . . .
>
> Whether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.

International Shoe Co. v. Washington, 326 U.S. 310, 316, 319 (1945).

> [Restrictions on the personal jurisdiction of state courts] are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.

Hanson v. Denckla, 357 U.S. 235, 251 (1951).

To resolve the jurisdictional question presented, we must determine (a) whether the constitutional strictures of *International Shoe* and its progeny apply to jurisdiction denominated *quasi in rem* and (b) if they do, whether the statutory situs of 8 Del. C. § 169, alone, is a sufficient minimum contact to support the jurisdiction here exercised.

A.

The Delaware Supreme Court recently had occasion to consider the problem in *Greyhound Corp. v. Heitner,* — A.2d — (Del. Sup. Ct. No. 132, April 15, 1976), *appeal filed sub nom. Shaffer v. Heitner,* 44 U.S.L.W. 3739 (June 22, 1976) (No. 75-1812). In upholding the constitutionality of the Delaware sequestration procedure, the Delaware Supreme Court swiftly disposed of the contention that minimum contacts were lacking where jurisdiction was based on the statutory situs rule of § 169:

> There are significant constitutional questions at issue here but we say at once that we do not deem the rule of *International Shoe* to be one of them. An argument based on that case was made in *Breech v. Hughes Tool Company,* Del. Supr., 189 A.2d 428 (1963), and rejected by this Court. Compare *Hibou, Inc. v. Ramsing,* Del. Super., 324 A.2d 777 (1974). We are not persuaded that *Breech* should now be abandoned. The reason, of course, is that jurisdiction

under § 366 remains, as it was in 1963, *quasi in rem* founded on the presence of capital stock here, not on prior contact by defendants with this forum. Under 8 *Del. C.* § 169 the "situs of the ownership of the capital stock of all corporations existing under the laws of this State . . . [is] in this State", and that provides the initial basis for jurisdiction. Delaware may constitutionally establish situs of such shares here, *Rogers v. Guaranty Trust Co. of New York,* 288 U.S. 123, 53 S. Ct. 295 (1932); *Jellenik v. Huron Copper Min. Co.,* 177 U.S. 1, 20 S. Ct. 559 (1900), it has done so and the presence thereof provides the foundation for § 366 in this case. Cf. *Breech v. Hughes Tool Company* supra. On this issue we agree with the analysis made and the conclusion reached by Judge Stapleton in *U.S. Industries, Inc. v. Gregg,* D. Del., 348 F. Supp. 1004 (1972).

Slip Opinion at 7-8 (footnote omitted).

Concerning a possible constitutional problem in the application of § 169 to shareholders whose certificates are located outside of Delaware, the Delaware Supreme Court was similarly curt in its rejection of the argument:

> Defendants argue also that the sequestration procedure is unconstitutional as applied to the interests of security holders whose certificates are located outside the State. They say that the certificates for the seized shares are physically outside Delaware and that the statutory attempt under 8 *Del. C.* § 169 to reserve the situs of shares here is "to indulge in a fiction."
>
> The argument is based largely, if not exclusively, on the right of a bona fide purchaser who acquires a certificate and, so far as we are informed, there is no such purchaser among defendants. As to these defendants, we have already determined that the shares have a situs here, *Rogers v. Guaranty Trust Co. of*

> *New York* supra; *Jellenik v. Huron Copper Min. Co.* supra; *U.S. Industries, Inc. v. Gregg* supra; compare *Breech v. Hughes Tool Company* supra, and, for present purposes that is conclusive on this contention.

Slip Opinion at 23-24.

Because the Delaware Supreme Court accepted the rationale and conclusion of the district court, we set forth the district court's four-paragraph treatment of this subject *in toto:*

> Gregg's first argument is based upon International Shoe v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945) and its progeny. He asserts that "under modern concepts of due process, a court cannot assert jurisdiction unless either the defendant or the subject matter of the action had at least minimal contacts with the forum."
>
> The "minimal contacts" doctrine to which Gregg refers is not applicable where, as here, the plaintiff invokes the *quasi in rem* jurisdiction of the court. While a contrary view has been urged as the wiser one,[17] the courts have accepted the view of Justice Holmes that the "foundation of jurisdiction is physical power".[18] Just as a court may exercise *in personam* jurisdiction in a suit on a transitory cause of action where the only contact with the forum state is personal service upon the defendant within that

---

[17.] See e.g., Ehrenzweig, The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Non Conveniens, 65 Yale L. Rev. 289 (1956); Carrington, The Modern Utility of Quasi In Rem Jurisdiction, 76 HARV. L. REV. 303 (1962). These commentators, however, recognize the prevailing view.

[18.] McDonald v. Mabee, 243 U.S. 90, 91, 37 S. Ct. 343, 61 L. Ed. 608 (1915). See also Goodrich, Conflicts of Law, § 73 (1965).

state,[19] so also may a court exercise jurisdiction over property within its control regardless of the presence or absence of other contacts with the forum state.[20] Where the court has either of these foundations for the exercise of its power, it may constitutionally proceed, though the absence of substantial contacts with the forum may lead it to decline to do so under the familiar principles underlying the doctrine of *forum non conveniens* [21] and the federal transfer provisions of 28 U.S.C. § 1404.

The state of a corporation's domicile may constitutionally provide, as Delaware has done, that the situs of its capital stock is in its home state.[22] Thus, where the stock of a domestic corporation is brought before the court, this provides a sufficient basis for the exercise of its *quasi in rem* jurisdiction even though the defendant may be a non-resident who has had no prior contacts with the forum state. Breech v. Hughes Tool Co., 41 Del. Ch. 128, 189 A.2d 428 (Del. Sup. Ct. 1963);

[19.] E.g., Fauntleroy v. Lum, 210 U.S. 230, 28 S. Ct. 641, 52 L. Ed. 1039 (1908); Restatement, Conflicts of Laws, §§ 77, 78; Goodrich, Conflict of Laws, § 73 (1964).

[20.] *Cf.* Hanson v. Denckla, 357 U.S. 235, 246, 78 S. Ct. 1228, 2 L. Ed.2d 1283 (1957); Beal, Conflicts of Laws, §§ 106.3, 107.3 (1935); Goodrich, Conflicts of Law, § 70 (4th Ed. Scoles 1964).

[21.] E.g., Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947); General Foods Corp. v. CryoMaid, Inc., 41 Del. Ch. 474, 198 A.2d 681 (Del. Sup. Ct. 1964). The cases relied upon by Gregg arise because of the difficulty of applying traditional concepts of *in personam* jurisdiction over individuals in suits against foreign corporations. Even in such cases if the corporation's activities in a state are substantial enough it is ordinarily subject to suit there on causes of action unrelated to the business conducted in the forum state. See e.g., Restatement (Second) Conflict of Laws, § 47 (1971).

[22.] Rogers v. Guaranty Trust Co., 288 U.S. 123, 53 S. Ct. 295, 77 L. Ed 652 (1932); Jellenik v. Huron Copper Mining Co., 177 U.S. 1, 20 S. Ct. 559, 44 L. Ed. 647 (1899).

Ownbey v. Morgan, 256 U.S. 94, 41 S. Ct. 433, 65 L. Ed. 837 (1920).[23]

Gregg attempts to distinguish the relevant authorities by saying that this is not in reality a *quasi in rem* action. He correctly points out that an avowed purpose of Delaware's sequestration statute is to compel a general appearance and thereby produce a basis for *in personam* jurisdiction. While the statute is concededly designed to produce this result, it does not follow that the action is not governed by the rules applicable to *quasi in rem* jurisdiction. Unless and until the non-resident defendant elects to enter a general appearance, the power of the court is limited to the application of the property before the court to the plaintiffs' claim.[24]

[23.] [Incorporates note 26:]
Although neither the Delaware court nor the United States Supreme Court considered it significant, the *Ownbey* case appears to have been a suit by non-resident plaintiffs against a non-resident defendant arising out of the latter's activities as general manager of a Delaware corporation the activities of which were limited to the States of Colorado and New Mexico. Morgan v. Ownbey, 29 Del. 379, 6 Boyce 379, 100 A. 411 (1916).

[24.] 10 Del. C. § 366; Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed.2d 1283 (1958); *cf.* Jacobs v. Tenney, 316 F. Supp. 151 (D. Del. 1970); Restatement of Judgments, § 34 comment f (1942).

348 F. Supp. 1004, 1019-20 (D. Del. 1972).

We are persuaded that the cryptic conclusions of the Delaware Supreme Court and the district court cannot survive detailed critical analysis.

B.

The Delaware Supreme Court and the district court relied on four cases: *Rogers v. Guaranty Trust Co.*, 288 U.S. 123 (1932); *Ownbey v. Morgan*, 256 U.S. (1921); *Jellenik v. Huron Copper Mining Co.*, 177 U.S. 1 (1899); *Breech v. Hughes Tool Co.*, 189 A.2d 428 (Del. Sup. Ct.

1963). For reasons we will explain, we believe that reliance on these cases was misplaced.

As a preliminary matter, the three Supreme Court cases relied on to dispose of the *International Shoe* contentions were all decided before *International Shoe*. Their precedential vitality, therefore, to rebut a minimum contacts argument would seem dubious at best. But our uneasiness with these precedents goes further. *Jellenik* was not a constitutional law case at all; it involved only the construction of a federal statute which allowed a federal trial court to bring before it absent, nonresident defendants in an action to remove encumbrances upon title to personal property "within the district where such suit is brought". Justice Harlan wrote that the "question to be determined on this appeal is, whether the stock in question is personal property within the district in which the suit was brought." And he answered the question as follows:

> Whether the stock is in Michigan so as to authorize that state to subject it to taxation as against individual shareholders domiciled in another state is a question not presented in this cause, and we express no opinion upon it. But we are of opinion that it is within Michigan for the purposes of a suit brought there against the company—such shareholders being made parties to the suit—to determine whether the stock is rightfully held by them. The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owner. As the habitation or domicile of the company is and must be in the state that created it, the property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is, whenever it is sought by suit to determine who is its real owner.

177 U.S. at 13. Clearly, the opinion was carefully directed to the narrow statutory issue presented—whether the stock was within the district for purposes of a pure *in rem* action to determine ownership—and did not pretend to adjudicate constitutional questions or announce a constitutional rule.

Similarly, *Rogers v. Guaranty Trust Co.* was not a constitutional law case. *Rogers* was an action brought in New York state court seeking cancellation of certain shares in a New Jersey corporation authorized to and doing business in New York as well as in New Jersey. No question of constitutional limits to jurisdiction was adjudicated. The Court made clear that *both* states were in a position to exercise jurisdiction, but directed the New York federal court to decline to exercise jurisdiction on the basis of the discretionary "settled doctrine that a court—state or federal—sitting in one State will as a general rule decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another State but will leave controversies as to such matters to the courts of the State of the domicile." 288 U.S. at 130.

Finding no constitutional dimension to *Jellenik* or *Rogers*, we must disapprove reliance upon them as authority for rejecting the constitutional challenge here presented. The use of these cases as constitutional authorities is a classic example of illicit precedential inbreeding. The illegitimate conception apparently took place in *Breech v. Hughes Tool Co.*—the keystone of the *Greyhound* opinion on this issue. At issue in *Breech*, as here, was a federal constitutional challenge to the Delaware stock seizure practice. As here, plaintiff argued that there were no minimum contacts to justify *quasi in rem* jurisdiction. The Delaware Supreme Court met the argument thus: "This argument is interesting, but is clearly unsound under settled principles of law." 189 A.2d at 431. The settled principles of law consisted of the Delaware statutes, *Jellenik* and *Rogers*. The court's entire discus-

sion on this issue is set forth in the margin.[5] The inbreeding continued in the district court, reliance being had on the precedent of *Breech* as well as *Jellenik* and *Rogers.*

5. *Second.* Breech raises a constitutional question. He argues in effect that his Ford Motor Company stock has no situs in Delaware justifying the seizure. Since it is intangible property, it has a situs only by legal fiction; therefore the selection of a situs for intangibles must be one that embodies a "common sense appraisal of the requirements of justice and convenience in particular conditions." Per Cardozo, J., in Severnoe Securities Corp. v. London & Lancashire Ins. Co., 255 N.Y. 120, 123-124, 174 N.E. 299, 300. Breech analogizes this test to the federal test respecting the subjection of a foreign corporation to the jurisdiction of a state, i.e. a test based on "minimum contacts" with the state of the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 158, 90 L. Ed. 95.

Breech insists that if such a test be applied here, Delaware has no jurisdiction to seize his stock. There are no sufficient "contacts", he says, between the seized shares and the claim asserted by Toolco to justify *quasi in rem* jurisdiction. Hence the seizure should be vacated.

This argument is interesting, but is clearly unsound under settled principles of law. The seized shares have a Delaware situs because the Ford Motor Company is a Delaware corporation and the corporation law to which it owes its existence provides expressly that the situs of ownership of stock of all such corporations, for "all purposes of title, action, attachment, garnishment and jurisdiction of all courts in this State" shall be regarded as in this State. 8 Del. C. § 169.

In Jellenik v. Huron Copper Mining Co., 177 U.S. 1, 20 S. Ct. 559, 44 L. Ed. 647, the Supreme Court of the United States upheld the right of the State of Michigan to determine ownership of shares of stock of a Michigan corporation. The court quoted the provisions of the Michigan statute, including provisions for attachment of the stock, and said:

> "The authority of the state to establish such regulations in reference to the stock of a corporation organized and existing under its laws cannot be doubted." 20 S. Ct. 563.

And see Rogers v. Guaranty Trust Co., 288 U.S. 123, 53 S. Ct. 295, 298, 77 L. Ed. 652.

The attachment of stock of Delaware corporations, without seizure of the certificate representing the shares, upon the theory that the stock has a statutory situs here, has existed since at

Finally, in *Greyhound,* the Delaware Supreme Court was in a position to state that it was "not persuaded that *Breech* should be abandoned," citing a line of cases: *Jellenik, Rogers,* and the district court opinion in this action. We cannot accept the notion that the mere proliferation of unwarranted reliances on old cases suffices to settle a contemporary issue in a dynamic field of law.

C.

Like *Jellenik, Rogers,* and *Breech, Ownbey v. Morgan,* the fourth case, does not dictate the outcome of this litigation. *Ownbey,* however, deserves separate consideration. Challenged in *Ownbey,* and sustained by the Supreme Court, was a former Delaware statutory requirement that a defendant put up a "special bail" in a foreign attachment suit in order to be allowed to appear and defend on the merits. Ownbey was unable to put up the bail and a default judgment was entered against him. The *Ownbey* Court apparently rested its decision on a theory of implied consent as well as on the historical and customary validity of the practice in issue.

5. (Cont'd.)

least 1852 (Code, § 1253). The "situs" section cited above (§ 169), stems from the corporation law of 1899. 21 Del. L. c. 273, § 128. These statutes thus embody a settled Delaware policy, and the court may not overturn it on the basis of a suggested federal rule that has never been announced.

The weakness of Breech's contention is exposed by his concession that the attachment of Hughes' stock in "Toolco" was legal "because of the intimate relationship between the stock and cause of action alleged by plaintiff TWA." We have considerable difficulty in following this distinction. The primary purpose of the seizure is to compel appearance in a law suit, and to this purpose neither the nature of the property seized nor its incidental connection with the law suit seems material.

We are of opinion that the seizure was a constitutional exercise of power.

189 A.2d at 430-31.

> [A] property owner who absents himself from the territorial jurisdiction of a State, leaving his property within it, must be deemed *ex necessitate* to consent that the State may subject such property to judicial process to answer demands made against him in his absence, according to any practicable method that reasonably may be adopted. A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the States as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law, even if it be taken with its ancient incident of requiring security from a defendant who after seizure of his property comes within the jurisdiction and seeks to interpose a defense.

256 U.S. at 111.

We recognize that there is disagreement about the continued vitality of *Ownbey* as measured by contemporary standards. In relying on the historical validity of the practi , *Ownbey* ignored the fact that state procedures had no due process significance prior to the 1868 adoption of the Fourteenth Amendment. Moreover, the Supreme Court, more recently, has tartly reminded that "[t]he fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms." *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340 (1960). Judge Gibbons has concluded that "[i]t is inconceivable that *Ownbey* would be decided today as it was decided in 1921." *Jonnet v. Dollar Savings Bank*, 530 F.2d 1123, 1136 (3d Cir. 1976).

It is contended, however, that *Ownbey* survives with full vigor because it has been recently cited by the Supreme Court. The contention merits analysis. In *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972), the Supreme Court cited *Ownbey* to support this statement:

> Only in a few limited situations has this Court allowed outright seizure [23] without opportunity for a prior hearing.

[23] Of course, outright seizure of property is not the only kind of deprivation that must be preceded by a prior hearing. See, *e.g., Sniadach v. Family Finance Corp., supra.* In three cases, the Court has allowed the attachment of property without a prior hearing. In one, the attachment was necessary to protect the public against the same sort of immediate harm involved in the seizure cases—a bank failure. *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29. Another case involved attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest. *Ownbey v. Morgan*, 256 U.S. 94. It is much less clear what interests were involved in the third case, decided with an unexplicated *per curiam* opinion simply citing *Coffin Bros.* and *Ownbey*. *McKay v. McInnes*, 279 U.S. 820. As far as essential procedural due process doctrine goes, *McKay* cannot stand for any more than was established in the *Coffin Bros.* and *Ownbey* cases on which it relied completely. See *Sniadach v. Family Finance Corp., supra*, at 340; *id.*, at 344 (Harlan, J., concurring).

Two years later, *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 613-14 (1972), mentioned *Ownbey* in the context of determining whether the petitioner in the case was entitled to a hearing before seizure. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 n.13 (1974), cited *Ownbey* in a discussion of considerations that justify postponement of notice and hearing until after seizure. Similarly, in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 610 (1975), *Ownbey* was cited as an instance where the Court had "approved prejudgment attachment liens."

Our review of these cases convinces us that, at the most, *Ownbey* has been cited by the Supreme Court from 1972 to 1975 to illustrate the few limited situations in which the Court historically has permitted seizure of property without opportunity for a prior hearing. Whether the case retains vitality for more than that seems here a moot issue. The brute fact is that *Ownbey* adjudicated the constitutionality of a statutory procedure since abandoned. While the case, incidentally, did involve the seizure of stock, it

did not adjudicate the question of *situs;* and certainly it did not anticipate the minimum contacts doctrine of *International Shoe.*[6] *Ownbey* did, however, rely in part on the ancient distinction between actions *quasi in rem* and actions *in personam*—the distinction which formed the major premise of the Delaware Supreme Court's truncated analysis in *Greyhound Corp. v. Heitner, supra.* We turn now to an analysis of that distinction in the context of this case.

IV.

We begin our inquiry into the constitutional dimensions of *quasi in rem* jurisdiction by conceding that the minimum contacts language of *International Shoe* was expressly made applicable to the exercise of jurisdiction *in personam.* Subsequent cases, however, have made it clear that ancient labels do not control the content of constitutional guarantees. Referring to the distinction between *in rem, quasi in rem,* and *in personam* actions, *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 312 (1950), emphasized that "the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state." Later, *Hanson v. Denckla,* 357 U.S. 235, 246 (1958), articulated the constitutional requirement in terms of *af-*

6. In *Fuentes,* the Supreme Court mentioned *Ownbey* as involving an attachment "necessary to secure jurisdiction." It is worth remembering that *Ownbey* was decided before *International Shoe* stimulated the enactment of long arm statutes. When *Ownbey* was decided, attachment was often necessary to secure jurisdiction (*quasi in rem*) over a nonresident defendant; today, at least if there are minimum contacts, full *in personam* jurisdiction can usually be obtained under a long arm statute. Arguably, then, the need to secure jurisdiction that justified *Ownbey* is now fully met by long arm jurisdiction, and could no longer serve to support the harsh result in that case.

filiating circumstances[7] "without which the courts of a State may not enter a judgment imposing obligations on persons (jurisdiction *in personam*) or affecting interests in property (jurisdiction *in rem* or quasi in rem)."

Hanson involved, *inter alia,* an attempt by Florida to exercise jurisdiction over trust assets in Delaware based upon the fact that the settlor-decedent had established a Florida domicil after executing the trust. Having made clear in a footnote that it was using "*in rem*" in lieu of "*in rem* and *quasi in rem,*" 357 U.S. at 246 n.12, the Court had this to say generally about such jurisdiction:

> Founded on physical power, *McDonald v. Mabee,* 243 U.S. 90, 91, the *in rem* jurisdiction of a state court is limited by the extent of its power and by the coordinate authority of sister States. The basis of jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State. *Rose v. Himely,* 4 Cranch 241, 277; *Overby v. Gordon,* 177 U.S. 214, 221-222. Tangible property poses no problem for the application of this rule but the situs of intangibles is often a matter of controversy.

357 U.S. at 246-47 (footnote omitted). Finding it essential to scrutinize the affiliations that might justify Florida's exercise of jurisdiction, the Court concluded: "For the purpose of jurisdiction *in rem* the maxim that personalty has its situs at the domicil of its owner is a fiction of limited utility. *Green v. Van Buskirk,* 7 Wall. 139, 150. The maxim is no less suspect when the domicil is that of a decedent. . . . The fact that the owner is or was domiciled within the forum State is not a sufficient affiliation with the property upon which to base jurisdiction *in rem.*" 357 U.S. at 246.

7. Apparently the phrase was suggested by Professor E. R. Sunderland. See Sunderland, *The Problem of Jurisdiction,* 4 TEXAS L. REV. 429 (1936), reprinted in SELECTED ESSAYS ON CONSTITUTIONAL LAW, BOOK 3, 1270, 1272 (1938).

We can only understand *Mullane* and *Hanson* as establishing a constitutional limit to state court jurisdiction wholly independent of the label—*in rem, quasi in rem,* or *in personam*—that may be affixed to that jurisdiction. And whether it be called affiliating circumstances or minimum contacts,[8] we must assume that ultimately the test of *International Shoe* is determinative: that there be sufficient connection with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U.S. at 316.

Judge Gibbons calls the problem here the "bifurcation of *International Shoe's* jurisdictional doctrine." *Jonnet v. Dollar Savings Bank,* 530 F.2d 1123, 1132 (3d Cir. 1976). He has placed the matter in proper perspective, chronologically and jurisprudentially:

> The analytical point of departure for those cases which have sustained against jurisdictional challenge foreign attachment procedures has traditionally been a quartet of Supreme Court cases reviewing judgments of state courts: *Pennoyer v. Neff,* 95 U.S. 714, 24 L. Ed. 565 (1877); *Harris v. Balk,* 198 U.S. 215, 25 S. Ct. 625, 49 L. Ed. 1023 (1905); *Pennington v. Fourth National Bank,* 243 U.S. 269, 37 S. Ct. 282, 61 L. Ed. 713 (1917); *Ownbey v. Morgan,* 256 U.S. 94, 41 S. Ct. 433, 65 L. Ed. 837 (1921). See, e.g., *Steele v. G. D. Searle & Co.,* 483 F.2d 339 (5th Cir. 1973), *cert. denied,* 415 U.S. 958, 94 S. Ct. 1486, 39 L. Ed.2d 572 (1974). All of these cases were decided before the Supreme Court in *International Shoe* redefined the due process limitations upon the exercise of judicial power over disputes foreign to the forum. All were decided before the Supreme Court in the escheat cases recognized that there are due process limitations upon the power of a state which has permitted a corporation

8. In *Hanson,* the Supreme Court used the phrases interchangeably, evidently attributing the same constitutional content to both. See 357 U.S. at 250, 251.

> chartered by it to do business, issue securities and incur debts beyond its borders to insist upon the fiction of a local situs for its securities and debts. *Western Union Telegraph Co. v. Pennsylvania,* 368 U.S. 71, 82 S. Ct. 199, 7 L. Ed.2d 139 (1961); *Texas v. New Jersey,* 379 U.S. 674, 85 S. Ct. 674, 13 L. Ed.2d 596 (1964), 380 U.S. 518, 85 S. Ct. 1136, 14 L. Ed.2d 49 (1965). No Supreme Court case has actually considered the due process issues tendered by this appeal, since the constitutional interpretations which raise them had not yet been made at the time either *Pennoyer v. Neff* or *Ownbey v. Morgan* was decided.

530 F.2d at 1131-32. Judge Gibbons' analysis, a scholarly, carefully documented history of *quasi in rem* foreign attachment in the federal courts develops a thesis to which we perceive no effective rebuttal. "Although it can be argued," he concludes, "that the content of constitutional process due a litigant defending title to property will vary from that due a litigant defending himself from liability in personam, there is no reason to believe that the Supreme Court presently recognizes such a distinction. . . . In short, the same limitations of fundamental fairness apply to any exercise by the state of judicial powers, whether that exercise be denominated in rem, quasi in rem or in personam. One of those limitations . . . is the *International Shoe* rule." *Ibid.* at 1136-37. We agree.

Our conclusion that *International Shoe* applies to *quasi in rem* actions is contrary to the district court's statement that "[t]he 'minimal contacts' doctrine to which Gregg refers is not applicable where, as here, the plaintiff invokes the *quasi in rem* jurisdiction of the court." 348 F. Supp. at 1020. Our conclusion also severely erodes the foundation of the Delaware Supreme Court's truncated analysis in *Greyhound Corp.* that *International Shoe* did not apply because "jurisdiction under § 366 remains, as it was in 1963, *quasi in rem* founded on the presence of cap-

ital stock here." Slip Opinion at 7. Far from ending the constitutional inquiry, we believe that the *quasi in rem* character of the jurisdiction constitutes the analytical beginning point for the application of constitutional precepts to the case.

V.

We must decide whether the single fact of statutory situs of stock under 8 Del. C. § 169 suffices to give Delaware sufficient contact or affiliation with this litigation to satisfy constitutional standards. In our view, it does not.

We do not exaggerate in saying that § 169 is the single affiliation with Delaware in this case. The cause of action did not arise in Delaware. The defendant is not a citizen or resident of Delaware; he conducts no business in the state and owns no property physically located there. His sole contact is his interest in shares of USI represented by certificates located in Florida. The plaintiffs' connections with Delaware—insofar as that may be relevant [9]—are similarly sparse. Diversacon has no connection whatsoever: it is a Florida corporation having its principal place of business in Florida. USI is incorporated in Delaware but has its principal place of business in New York; it owns no property [10] and maintains no business establishments in Delaware other than a registered agent's office as required by statute.

9. It can plausibly be argued that a plaintiff's contacts with the forum are irrelevant for jurisdictional purposes. *Jonnet v. Dollar Savings Bank, supra,* 530 F.2d at 1141 (Gibbons, J., concurring). *Contra, Farrell v. Piedmont Aviation, Inc., infra.* We need not reach the issue, however, because here the plaintiffs' contacts with the forum are insufficient even assuming their relevance.

10. The absence of plaintiffs' assets in the state distinguishes this case from *Baker v. Gotz,* 492 F.2d 1238 (3d Cir. 1974) (in banc), *aff'g mem. by an equally divided court* 336 F. Supp. 197 (D. Del. 1971), *cert. denied,* 417 U.S. 955 (1974). In *Baker,* the plaintiff railroad corporation, although a Pennsylvania corporation, did business and had substantial assets in Delaware.

Because even the *plaintiffs* here cannot with reason be characterized as residents of Delaware, *Minichiello v. Rosenberg,* 410 F.2d 106 (2d Cir. 1968), *aff'd on rehearing in banc,* 410 F.2d 117, *cert. denied,* 396 U.S. 844 (1969), provides no precedential support for sustaining jurisdiction here. In *Minichiello,* the majority seemed to uphold the constitutionality of *Seider v. Roth,* 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), on the basis that the *Seider* procedure (a judicially created direct action against liability insurance carriers) would be available only for New York resident plaintiffs or plaintiffs injured in New York. The limitation to New York residents was affirmed in *Farrell v. Piedmont Aviation, Inc.,* 411 F.2d 812 (2d Cir.), *cert. denied,* 396 U.S. 840 (1969), Judge Friendly observing that "the constitutional doubt with respect to applying Seider v. Roth in favor of nonresidents would be exceedingly serious" and that the "doubt arises from New York's lack of meaningful contact with the claim." *Ibid.* at 817. In *Farrell,* the formality of appointing a New York administrator of a nonresident decedent's estate did not supply the necessary meaningful contact with New York. As in *Farrell,* it would seem that the plaintiffs' contacts with the forum here are more formal than meaningful, at least in constitutional terms.

Indeed, it is difficult to imagine how litigation implicating a Delaware corporation could have fewer or less meaningful contacts with the state. The brute fact is that USI's Delaware incorporation is the only genuine contact this litigation has with Delaware. It is our view that, under these circumstances, the fictional § 169 situs of stock in Delaware does not pass constitutional muster as a predicate for jurisdiction in an action admittedly seeking to obtain personal liability of a nonresident in connection with transactions unrelated to the forum.

Again, we are impressed by Judge Gibbons' analysis:

> As a metaphysical exercise it may be asserted that since the very existence of the corporations is de-

pendent upon state law, state law should be regarded as supreme in defining the situs of intangibles resulting from such corporate existence. But the state has permitted the corporations to stray far from its boundaries, and to issue intangibles without its jurisdiction. New Jersey once contended that since it issued a corporation's charter, it could determine the situs of intangibles in an in rem proceeding. The Supreme Court rejected this contention in *Texas v. New Jersey, supra.* Justice Black's opinion recognized that a local contacts analysis suggested by *International Shoe* and *Mullane v. Central Hanover Bank & Trust Co.* would be unworkable in escheat cases, because more than one jurisdiction might have contacts minimally sufficient to support the exercise of adjudicatory authority over the dispute. Nevertheless, he rejected the fictionalized situs approach, announcing instead a rule favoring the state of the last known address of the creditor. There is no more justification for recognizing state notions of fictionalized situs of corporate intangibles in a *quasi-in-rem* case than in an escheat case. Indeed, the state's interest in a fictionalized local situs is stronger in the escheat case, where it is at least acting in its own interest rather than on behalf of a private litigant.

Jonnet, supra, 530 F.2d at 1139.

Considering the factors that might properly qualify as affiliating circumstances to support jurisdiction, *Hanson v. Denckla, supra,* gave short shrift to the proposition that the situs of personalty is the owner's domicil: "For the purpose of jurisdiction in rem the maxim that personalty has its situs at the domicil of its owner is a fiction of limited utility." 357 U.S. at 249. We see no more jurisdictional[11] utility to the fiction that the corporation's

11. We readily concede that the law of the state of incorporation might be a critical, even controlling, factor for choice of law purposes. But questions of constitutional jurisdiction we believe are wholly different from choice of law issues.

domicil—the state of incorporation—is the situs of its stock. In *Texas v. New Jersey,* 379 U.S. 674 (1965), New Jersey argued that the state of incorporation of a debtor corporation ought to have the power to escheat an abandoned debt. Justice Black answered: "[I]t seems to us that in deciding a question which should be determined primarily on principles of fairness, it would too greatly exalt a minor factor to permit escheat of obligations incurred all over the country by the State in which the debtor happened to incorporate itself." *Ibid.* at 680. Here too we apply "principles of fairness" and see no reason to "exalt a minor factor."

While the focus of our attention has been the situs provision of § 169, the result we reach is buttressed by the operation in this case of the rule of *Sands v. Lefcourt Realty Corp., supra.* Under the interpretation that case gave to the statutory schema, the nonresident defendant is inexorably put to a Hobson's choice: either surrender by default the entire value of the seized property or submit to *in personam* jurisdiction. Keeping in mind the admonition of *Mullane* that constitutional standards do not depend on "elusive and confused" state law classifications, we wonder whether this jurisdiction realistically ought to be considered as *quasi in rem.* The purpose of the Delaware procedure is to coerce the nonresident to submit to *in personam* jurisdiction. And it is difficult to conceive of a more potent jurisdiction—irrespective of its label—than the jurisdiction exercised here. Unless Gregg chose to default the $2 million in stock certificates he could have been held personally to answer for a claim in excess of $20 million in a forum unrelated to him or the transaction at issue. Of course, if this case were analyzed under an *in personam* rubric, the conclusion we have reached would follow just as surely.

Having been persuaded that the statutory situs of stock in Delaware under 8 Del. C. § 169 was an insufficient contact with the state constitutionally to support the juris-

diction here exercised, and that Gregg is entitled to relief on that basis, it is not necessary to meet Gregg's other constitutional contentions.

The judgment of default entered by the district court will be reversed and the proceedings remanded with a direction to dismiss the complaint for want of jurisdiction over the person.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2177

U. S. INDUSTRIES, INC., a corporation, and DIVERSACON INDUSTRIES, INC., a corporation

v.

F. BROWNE GREGG,

Appellant

(D. C. Civil Action No. 4431)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: ALDISERT, KALODNER, and WEIS, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered August 20, 1975, be, and the same is hereby reversed and the cause is remanded with a direction to dismiss the complaint for want of jurisdiction over the person, in accordance with the opinion of this Court. Costs taxed against the appellees.

ATTEST:
THOMAS F. QUINN
Clerk

July 19, 1976

Supreme Court, U. S.
FILED
NOV 17 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

No. 75-1812.

R. F. SHAFFER, et al.,

Appellants,

v.

ARNOLD HEITNER, as Custodian for MARK ANDREW HEITNER,

Appellee.

On Appeal From the Supreme Court of the State of Delaware.

APPELLANTS' BRIEF ON THE MERITS.

RICHARDS, LAYTON & FINGER,
4072 DuPont Building,
Wilmington, Delaware. 19801

EDMUND N. CARPENTER, II,
R. FRANKLIN BALOTTI,

McCUTCHEN, DOYLE, BROWN & ENERSEN,
Three Embarcadero Center
San Francisco, California. 94111

JOHN R. REESE,
LYNN H. PASAHOW,

Attorneys for Appellants.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX TO BRIEF.

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTE AND CONSTITUTIONAL PROVISION INVOLVED	3
QUESTION PRESENTED	3
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. The Sequestration Statute as Applied Violates Due Process Because It Deprives Defendants of Their Property Without Notice or Opportunity for Hearing or Other Adequate Safeguards	7
A. Obtaining Jurisdiction Over Nonresident Defendants in a Private Civil Action Is Not an Extraordinary Situation	8
B. There Are No Other Safeguards	14
II. Even if the Sequestration Process Were Otherwise Constitutional, Appellants May Not Constitutionally Be Coerced to Submit to the Personal Jurisdiction of the Delaware Court in the Absence of Minimal Contacts of the Defendants With Delaware	20
CONCLUSION	28
EXHIBIT A	29

TABLE OF CITATIONS.

Cases: Page

Astol Calero-Toledo v. Pearson Yacht Leasing Co., 416 U. S. 663 (1974) 10, 12
Boddie v. Connecticut, 401 U. S. 371 (1971) 18
Terral v. Burke Construction Co., 257 U. S. 529 (1922) 18, 23
Dry Clime Lamp Corp. v. Edwards, 389 F. 2d 590 (5th Cir. 1968) 23
Farrell v. Piedmont Aviation, Inc., 411 F. 2d 812 (2nd Cir.), cert. denied, 396 U. S. 840 (1969) 23
Fashion Two Twenty, Inc. v. Steinberg, 339 F. Supp. 836 (E. D. N. Y. 1971) 27
Fuentes v. Shevin, 407 U. S. 67 (1972) 7, 9, 10, 11, 13, 16, 19, 23
Haas v. Haas, 35 Del. Ch. 392, 119 A. 2d 358 (Ch. 1955) ... 26
Hanson v. Denckla, 357 U. S. 235 (1958) 20, 21, 26
International Shoe Co. v. Washington, 326 U. S. 310 (1945) 6, 13, 14, 18, 19, 20, 21, 25
Jellenik v. Huron Copper Mining Co., 177 U. S. 1 (1900) ... 27
Jonnet v. Dollar Sav. Bank of City of New York, 530 F. 2d 1123 (3rd Cir. 1976) 9, 26, 27
Minichiello v. Rosenberg, 410 F. 2d 106 (2nd Cir. 1968), cert. denied, 396 U. S. 844 (1969) 23
Mitchell v. W. T. Grant Co., 416 U. S. 600 (1974) 9, 10, 11, 16
Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306 (1950) 21
North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U. S. 601 (1975) 7, 9, 10, 11, 13, 16, 18, 19, 23
Ownbey v. Morgan, 256 U. S. 94 (1921) 8, 9, 10, 13
Podolsky v. Devinney, 281 F. Supp. 488 (S. D. N. Y. 1968) .. 23
Rogers v. Guaranty Trust Co., 288 U. S. 123 (1933) 26, 27
Sands v. Lefcourt Realty Corp., 35 Del. Ch. 340, 117 A. 2d 365 (Sup. Ct. 1955) 20
Simpson v. Loehmann, 21 N. Y. 2d 305, 287 N. Y. S. 2d 633, 234 N. E. 2d 669 (1967), rearg. denied, 21 N. Y. 2d 990, 290 N. Y. S. 2d 914, 238 N. E. 2d 319 (1968) 23
Sniadach v. Family Finance Corp., 395 U. S. 337 (1969) 7, 10, 11, 23
Tenney v. Jacobs, 43 Del. Ch. 526, 240 A. 2d 138 (Sup. Ct. 1968) 19, 20

TABLE OF CITATIONS (Continued).

Cases (Continued): Page

Trans World Airlines, Inc. v. Hughes, 40 Del. Ch. 523, 185 A. 2d 762 (Ch. 1962), aff'd sub nom. Breech v. Hughes Tool Co., 41 Del. Ch. 128, 189 A. 2d 428 (Sup. Ct. 1963) 15, 17
U. S. Industries, Inc. v. Gregg, 540 F. 2d 142 (3rd Cir. 1976) 13, 22, 24, 25, 27
Wagman v. Astle, 380 F. Supp. 497 (S. D. N. Y. 1974) 27
Weller v. Cromwell Oil Company, 504 F. 2d 927 (6th Cir. 1974) 27
Western Union Co. v. Pennsylvania, 368 U. S. 71 (1961) 27
Wilshire Oil Company v. Riffe, 409 F. 2d 1277 (10th Cir. 1969) 27

Statutes:

Constitution of the United States:
Fourteenth Amendment, section 1 ..... 3, 5
Delaware Statutes:
6 Del. C. § 8-102 26
6 Del. C. § 8-105 26
6 Del. C. § 8-301 26
8 Del. C. § 168 26
8 Del. C. § 169 26
10 Del. C. § 366 ..... 3, 4, 17
United States Code:
Title 28, section 1257(2) 2

Miscellaneous:

Currie, Attachment and Garnishment in the Federal Courts, 59 Mich. L. Rev. 337 (1961) 9
Developments in the Law State-Court Jurisdiction, 73 Harv. L. Rev. 909 (1960) 18
Folk, The Delaware General Corporation Law, 179-180 (1972) 26
Folk and Moyer, Sequestration in Delaware: A Constitutional analysis, 73 Colum. L. Rev. 749 (1973) 14, 23, 24
Quasi in Rem Jurisdiction and Due Process Requirements, 82 Yale L. J. 1023 (1973) 13

IN THE

Supreme Court of the United States

—

OCTOBER TERM, 1976.

—

No. 75-1812

—

R. F. SHAFFER, et al.,

Appellants,

v.

ARNOLD HEITNER, as Custodian for
MARK ANDREW HEITNER,

Appellee.

—

APPELLANTS' BRIEF ON THE MERITS.

—

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF DELAWARE.

—

OPINIONS BELOW.

The opinion of the Supreme Court of the State of Delaware is reported at 361 A. 2d 225. The opinion of the court of chancery is not reported. Copies are reproduced in the Joint Appendix at pages A97 and A73 respectively.

JURISDICTION.

This is a shareholder's derivative action commenced in the Delaware Court of Chancery. Plaintiff-appellee Heitner sought to obtain personal jurisdiction over defendants-appellants, none of whom resides in Delaware, by sequestering their shares of capital stock in a Delaware corporation. The seizure was purportedly effected by an order directing the corporation to make appropriate notations on its books. The court of chancery denied defendants' motion to quash the sequestration order and to dismiss. The Supreme Court of Delaware affirmed on April 15, 1976. The notice of appeal to this Court was filed in the Delaware Supreme Court on May 7, 1976. This Court has jurisdiction under section 1257(2) of Title 28, United States Code, on the ground that the decision below upheld the validity of a state statute against a claim that it is repugnant to the fourteenth amendment of the United States Constitution. Probable jurisdiction was noted on October 4, 1976.

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED.

The statute involved is the Delaware sequestration statute, 10 *Del. C.* § 366. It is set out in full text in Exhibit A to this brief. The constitutional provision involved is section 1 of the fourteenth amendment to the Constitution of the United States, which provides in pertinent part as follows:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

QUESTION PRESENTED.

Does the fourteenth amendment permit Delaware to coerce nonresident individual defendants having no contacts with Delaware to submit to personal jurisdiction of the Delaware courts by sequestering, without notice or hearing and without taking physical possession, capital stock owned by them in a Delaware corporation, and denying them the right to defend that property unless they enter a general appearance which would subject them to possible liability in amounts exceeding the value of the sequestered property?

STATEMENT OF THE CASE.

This is a derivative action brought by a holder of one share of stock of The Greyhound Corporation ("Greyhound") against twenty-eight individuals or, in one case, an estate, purportedly on behalf of Greyhound, and Greyhound's wholly-owned subsidiary, Greyhound Lines, Inc. The amended complaint alleges that during the period 1957 to 1974 certain of the individual defendants were officers or directors of Greyhound, a Delaware corporation with its principal place of business at Phoenix, Arizona, and that the remaining individual defendants were officers or employees of Greyhound Lines, Inc., a California corporation which also has its principal place of business at Phoenix, Arizona. The complaint charges that Greyhound suffered losses as a result of conduct of defendants which allegedly caused Greyhound to have been found to have violated the antitrust laws as well as an order of a United States district court (A. 4-17, 39-40).[1]

Neither the plaintiff nor any of the individual defendants is a resident of Delaware. No individual defendant was served personally with summons, nor was there any attempt to demonstrate that any of them has or ever had any contact with Delaware.

Instead, plaintiff sought to subject defendants to Delaware's jurisdiction by invoking the procedure under Delaware's sequestration statute, 10 *Del. C.* § 366, and sequestering Greyhound capital stock owned by the defendants.

On May 22, 1974, upon the filing of his complaint, plaintiff applied for and the Delaware Court of Chancery issued, without notice or hearing, an order,

> 1. Directing the individual defendants to appear and answer the complaint;

1. The Joint Appendix is cited herein as "A.—."

> 2. Seizing "property of the [individual] defendants in the State of Delaware;" and
>
> 3. Directing the sequestrator to cause Greyhound to report on the securities held by defendants, to cause entries to be made in its books showing that the securities had been sequestered, not to transfer those securities or permit them to be transferred, except as permitted by the order, and to do all that is necessary to hold these securities until further order (A. 19-24, 49-54).

Under the Delaware procedure, as interpreted and applied by its courts, the defendants have no remedy against the seizure, or any subsequent disposition of the property (other than for technical noncompliance with the statute), nor do they have a right to defend against plaintiff's claims on the merits, unless they make a general appearance and submit to the *in personam* jurisdiction of the Delaware court.

On July 30, 1974, the individual defendants filed a notice and motion to quash service of process, to vacate the order of sequestration and to dismiss the action as to them. Their motion was based primarily on the ground that the Delaware sequestration procedure violates the due process clause of the fourteenth amendment of the United States Constitution (A. 37-38)[2]. The court of chancery denied defendants' motions and upheld the validity of the Delaware statute (A. 73), and the Delaware Supreme Court affirmed (A. 97). This appeal followed.

2. Subsequent to the filing of the motion, plaintiff was granted leave to file an amended complaint in order to cure a technical defect raised by defendants, and an alias writ of sequestration was issued. Defendants then moved again on the same grounds against these pleadings (A. 47-54, 68-69).

SUMMARY OF ARGUMENT.

Delaware has seized defendants' property without notice or any opportunity for hearing. The purpose of the seizure is to force defendants to submit to *in personam* jurisdiction in a private action brought by a nonresident plaintiff. The seizure was premised solely upon defendants' nonresidence and the fictional situs of shares of capital stock in Delaware, without consideration by anyone of the merit or lack of merit of plaintiff's claims. Delaware does not afford defendants any way to obtain the release of the property or to defend their right to it except by giving up their constitutional rights under the fourteenth amendment and *International Shoe Co. v. Washington*, 326 U. S. 310 (1945).

The Delaware procedure that takes away defendants' property without notice, hearing or other protection and denies them the right to defend unless they waive their constitutional rights obviously denies them due process of law.

Moreover, Delaware has attempted to coerce defendants to submit to *in personam* jurisdiction by seizing and threatening to dispose of their property by judicial sale although none of the defendants has the minimum contacts with Delaware required by the Constitution. That, in itself, violates defendants' fourteenth amendment rights.

Finally, Delaware cannot avoid what the Constitution requires by labeling the jurisdiction *quasi in rem*. This is so because Delaware's conceded purpose is to subject defendants to personal jurisdiction, because the existence of defendants' "property" in Delaware is wholly fictional and because Delaware does not permit defendants to defend at all unless they appear and put at risk not only the "property" seized, but everything else they have as well.

ARGUMENT.

I. The Sequestration Statute as Applied Violates Due Process Because It Deprives Defendants of Their Property Without Notice or Opportunity for Hearing or Other Adequate Safeguards.

We start with certain undisputed characteristics of the Delaware sequestration procedure. First, defendants' property is seized with no prior notice or hearing. Second, to obtain the seizure order as a matter of right plaintiff need only allege that defendants are nonresidents and that they own property in Delaware; whether plaintiff's claim has any merit is irrelevant.[3] Third, the principal purpose of the seizure is to coerce defendants to waive their due process rights and submit to the personal jurisdiction of the Delaware court where it would not otherwise exist. Fourth, defendants have no right even to any post-seizure hearing to defend their property *at all* unless they do submit to unlimited personal jurisdiction. Finally, if defendants stand on their rights and do not enter a general appearance the court may order their property to be sold without affording defendants any right to contest the merits of the alleged claim.

A procedure more unfair than this is difficult to conceive. It is in square conflict with this Court's decisions in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. 601 (1975), *Fuentes v. Shevin*, 407 U. S. 67 (1972) and *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969), which establish that a seizure of property without notice or hearing is unconstitutional except in extraordinary situations and unless there are sufficient other safeguards to satisfy due process.

3. There is no requirement that plaintiff's complaint be verified.

Even the Delaware Supreme Court acknowledged that "[s]uch a proceeding has the seeds if not the fruits of unfairness in permitting the impounding of property before judgment and, under some circumstances, upon thin assertions of right." (A. 99-100). Nevertheless, it sustained the sequestration procedure upon the dubious authority of *Ownbey v. Morgan*, 256 U. S. 94 (1921), and some superficial trappings of the procedure which appeared to it to provide safeguards.

A. Obtaining Jurisdiction Over Nonresident Defendants in a Private Civil Action Is Not an Extraordinary Situation.

The basis for the Delaware Supreme Court's conclusion that notice and hearing could be excused was its view that the acquisition of personal jurisdiction constitutes an "extraordinary situation." For that it relied upon *Ownbey v. Morgan*. *Ownbey*, in effect, assumed the validity of Delaware's foreign attachment statute which provided for a procedure at law analogous to the sequestration procedure in equity.[4] All the *Ownbey* Court held was that a nonresident defendant constitutionally could be required to post special bail before he was permitted to make a general appearance and secure release of the attachment. Mr. Justice Pitney, speaking for the Court, found the procedure constitutional simply because it was old:

> "A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the States as suited to their circumstances and needs, *cannot be deemed inconsistent with due process of law*, even if it be taken with its ancient incident of requiring security from a defendant who, after seizure of his property, comes within the jurisdiction and seeks to interpose a defense. The condition imposed has a reasonable relation to the conversion of a proceeding *quasi in rem* into an action *in personam;* ordinarily it is not difficult to comply with,—a man who has property usually has friends and credit,—and hence in its normal operation it must be regarded as a permissible condition . . . ." 256 U. S. at 111.[5]

4. As one commentator explains:

> "The constitutionality of the jurisdictional attachment in *Ownbey* was never challenged; indeed, the plaintiff [sic, defendant] argued for its continuation. Hence, it is unclear on what basis the courts can now use the citation of that case in *Sniadach* to justify *quasi in rem* seizure in all situations." Note, *Quasi In Rem Jurisdiction and Due Process Requirements*, 82 Yale L. J. 1023, 1026 (1973).

Ownbey v. Morgan is plainly a relic from another age.[6] As the Court of Appeals for the Third Circuit recently put it, ". . . *Fuentes, Mitchell* and *Di-Chem* cast serious doubt on *Ownbey's* current strength." *Jonnet v. Dollar Sav. Bank of City of New York*, 530 F. 2d 1123, 1128 (3rd Cir. 1976). And again, even more recently:

5. All emphasis herein is added unless otherwise stated.

6. One commentator has described it as "one of the more egregious injustices of modern times." Currie, *Attachment and Garnishment in the Federal Courts*, 59 Mich. L. Rev. 337, 379 (1961). Even contemporary comment on *Ownbey v. Morgan* suggested that the rule on which it was based had no place in modern jurisprudence:

> "It appeared that this harsh rule was derived from the Custom of London in foreign attachment, and had been brought over to America by the colonists, and that in Delaware it could show statutory continuity down to the present time. The court cites a number of cases from other seaboard states where the Custom of London also obtained a foothold, but an investigation of the statutory history of the rule in those states seems to indicate that in every one of them the rule long since succumbed to the progress of enlightened civilization and passed over the Styx into the shadowy land of legal tradition where the ghosts of ancient laws wander restlessly forever." Comment, 19 Mich. L. Rev., 853, 854 (1921).

"In relying on the historical validity of the practice, *Ownbey* ignored the fact that state procedures had no due process significance prior to the 1868 adoption of the Fourteenth Amendment. Moreover, the Supreme Court, more recently, has tartly reminded that '[t]he fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms.' *Sniadach v. Family Finance Corp.*, 395 U. S. 337, 340, 89 S. Ct. 1820, 1822, 23 L. Ed. 2d 349 (1960). Judge Gibbons has concluded that '[i]t is inconceivable that *Ownbey* would be decided today as it was decided in 1921.' *Jonnet v. Dollar Savings Bank*, 530 F. 2d 1123, 1136 (3rd Cir. 1976).

• • •

"The brute fact is that *Ownbey* adjudicated the constitutionality of a statutory procedure since abandoned." *U. S. Industries, Inc. v. Gregg*, 540 F. 2d 142, 152 (3rd Cir. 1976) (opinion set forth in full in Exhibit A to Brief of Appellants in Opposition to Motion to Dismiss and/or to Affirm).

Nevertheless, references to *Ownbey* appear in the opinions of this Court in both *Fuentes* and *Sniadach* and in Mr. Justice Powell's concurring opinion in *North Georgia Finishing*. See 407 U. S. at 91; 395 U. S. at 339; 419 U. S. at 610. Additional references in the same context are found in *Astol Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U. S. 663, 679 (1974), and *Mitchell v. W. T. Grant Co.*, 416 U. S. 600, 613 (1974), both of which involved the validity of certain prehearing seizure procedures.

The Delaware Supreme Court reviewed the Court's references to *Ownbey* in those decisions, acknowledged that their significance for foreign attachment statutes "is by no means complete, or clear" (A. 107), but nevertheless concluded that an attachment necessary to secure jurisdiction of a state court is an "extraordinary situation" in which notice and hearing may be excused (A. 107).[7] In reaching that conclusion the Delaware Court emphasized the footnote in *Fuentes* indicating that securing jurisdiction in a state court is "clearly a most basic and important public interest." 407 U. S. at 91, n. 23; A. 107. But, in relying upon the footnote the Delaware Supreme Court ignored the text. And it was in the text of *Fuentes* that this Court spoke directly to the question of "extraordinary situations":

"There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. *Boddie v. Connecticut*, 401 U. S., at 379. *These situations, however, must be truly unusual.* Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, *in each case, the seizure has been directly necessary to secure an important governmental or general public interest.* Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a governmental official responsible for determining, *under the standards of a narrowly drawn statute, that it was necessary*

7. The Delaware Court even suggested that the jurisdictional motivation for the seizure might somehow render inapplicable the constitutional principles of *Sniadach, Fuentes, Mitchell* and *North Georgia* (A. 109). But clearly a creditor who sold the property seized and retained some interest in it (such as the vendor's lien in *Mitchell*) has a *stronger* basis for attachment than someone like the plaintiff here, who has no claim to the property and seizes it to obtain jurisdiction. See *Mitchell v. W. T. Grant Co.*, 416 U. S. 600, 604 (1974), and *Fuentes v. Shevin*, 407 U. S. 67, 84, 86 (1972).

and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food.

"The Florida and Pennsylvania prejudgment replevin statutes serve no such important governmental or general public interest. They allow summary seizure of a person's possessions when no more than private gain is directly at stake. . . . But state intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health." 407 U. S. at 90-93 (footnotes omitted). See also *Astol Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U. S. at 679.

The Delaware sequestration statute is neither designed nor necessary to serve any basic or important governmental or general public interest. Sequestration is available to any private plaintiff who files an action in Delaware on any claim against any nonresident defendant, so long as that defendant happens to own securities issued by any Delaware corporation or other property which the Delaware Court considers subject to seizure.[8]

8. In view of the large number of corporations incorporated in Delaware, and the fact that their securities are widely held by the public, there are potentially hundreds of thousands, if not millions, of persons who are subject to Delaware's sequestration process (a process which is not restricted to officers or directors but runs against any nonresident shareholder). Indeed, officers and directors of a Delaware corporation are not required to own shares in the corporation, and such ownership, to the extent it is present in this case, is totally irrelevant to the charges made. 8 *Del. C.* § 141(b).

In short, the Delaware sequestration statute is not "narrowly drawn" and seizures are not limited to any "extraordinary" or "truly unusual" situations (pp. 11-12 above). Instead, they are used for the routine acquisition of jurisdiction over nonresident defendants in purely private disputes. That is not "extraordinary." It is commonplace.

Moreover, a drastic procedure such as sequestration is not at all "directly necessary" to serve a state's interest in affording its residents a remedy against foreign defendants. See *Fuentes v. Shevin*, 407 U. S. at 91. Whatever may have been the need for other procedures such as sequestration in the past, it is anything but compelling now that long-arm statutes are available. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. 601, 610 n. 1 (1975) (Powell, J., concurring).[9] But the exercise of jurisdiction under long-arm statutes of course is subject to the due process requirements enunciated in *International Shoe*. Delaware tries to evade these due process requirements by using sequestration rather than long-arm service. As discussed below, this attempt to exercise jurisdiction absent the minimum contacts required by *International*

9. As the Court in *U. S. Industries, Inc. v. Gregg*, 540 F. 2d 142 (3rd Cir. 1976), pointed out, the development of long-arm statutes has also contributed to *Ownbey's* obsolescense:

> "In *Fuentes*, the Supreme Court mentioned *Ownbey* as involving an attachment 'necessary to secure jurisdiction.' It is worth remembering that *Ownbey* was decided before *International Shoe* stimulated the enactment of long arm statutes. When *Ownbey* was decided, attachment was often necessary to secure jurisdiction (*quasi in rem*) over a nonresident defendant; today, at least if there are minimum contacts, full *in personam* jurisdiction can usually be obtained under a long arm statute. Arguably, then, the need to secure jurisdiction that justified *Ownbey* is now fully met by long arm jurisdiction, and could no longer serve to support the harsh result in that case." 540 F. 2d at 153 n. 6. See also Note, *Quasi in Rem Jurisdiction and Due Process Requirements*, 82 Yale L. J. 1023, 1031-1032 (1973).

Shoe itself violates appellants' due process rights. See part II below. It certainly cannot justify denial of their right to notice and hearing prior to seizure of their property. See Folk and Moyer, *Sequestration in Delaware: A Constitutional analysis,* 73 Colum. L. Rev. 749, 765-768 (1973).

B. There Are No Other Safeguards.

Even if the Delaware sequestration procedure were limited to extraordinary situations permitting seizure prior to hearing, which it clearly is not, it could be sustained only if it provides sufficient other safeguards to satisfy the requirements of due process, including a prompt and meaningful post-seizure hearing. But there are no such safeguards here, and defendants are not entitled to any meaningful post seizure hearing unless they waive their constitutional rights.

The court below acknowledged the requirement for adequate safeguards and enumerated those it thought to exist under the Delaware procedure (A. 109-114). Upon analysis, however, the provisions enumerated by the court are revealed as providing no safeguards at all.

(1) The court states that a court order is required for sequestration, but Delaware law gives the court no discretion to deny an application for a writ; a litigant is entitled to it as a matter of right, and the "sole relevant facts . . . are defendants' non-residence and their ownership of property within the state." Appellee's Motion to Dismiss and/or Affirm, p. 7, n. 9. The trial court below in its opinion denying appellants' motions stated in this respect:

> "The sequestration statute contains no provision for review by this Court as to the necessity for its use. By case precedent it is established that a plaintiff is entitled to sequestration as a matter of right as long as his application meets procedural formalities. If the application is formally sound, this Court has no discretion to deny this right. *Breech v. Hughes Tool Co.*, Del. Supr., 189 A. 2d 428 (1963). Nor does the Court have the power to first consider the merits of the claim as a condition to authorizing sequestration. *Trans World Airlines, Inc. v. Hughes,* Del. Ch., 185 A. 2d 762 (1962), *aff'd sub nom., Breech v. Hughes Tool Co., supra.*" (A. 83)

In the cited decision of *Trans World Airlines, Inc. v. Hughes,* 40 Del. Ch. 523, 185 A. 2d 762 (Ch. 1962), *aff'd sub nom. Breech v. Hughes Tool Co.,* 41 Del. Ch. 128, 189 A. 2d 428 (Sup. Ct. 1963), Vice Chancellor Marvel held:

> "Upon application for an order of sequestration Hughes Tool Company was required by court rule to establish that the non-resident Mr. Breech not only owned property in Delaware but that the other requirements of the applicable statute and rule had been met. This having been done, *an order of sequestration issued as a matter of course. It will not be quashed merely because the charges made against Mr. Breech may be insubstantial.*" 40 Del. Ch. at 528, 185 A. 2d at 765.

And the Delaware Supreme Court said, affirming that decision:

> "It has never been suggested, so far as we know, that the use of this process by a litigant is controllable by the court's discretion. We think that *he is entitled to it as a matter of right, just as he is entitled to a writ of summons.*" 41 Del. Ch. at 134, 189 A. 2d at 431-2.

In view of these statements of the law, to imply, as the opinion below does, that the signature of a judge, rather than a clerk, on an order gives rise to the kind of "control of the process" which this Court found to satisfy due process in *Mitchell* is ludicrous. *Cf. Mitchell v. W. T. Grant Co.*, 416 U. S. at 625 (Powell, J., concurring); *Carey v. Sugar*, – U. S. –, 96 S. Ct. 1208 (1976). Quite the contrary, Delaware's procedure is more accurately described by the Court's words in *Fuentes*:

> "The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure." 407 U. S. at 93. See also 407 U. S. at 91.

(2) The court states that the property to be seized must be identified with reasonable certainty. It is difficult to see how this would protect due process rights; it seems intended to help the sequestrator to locate and take away defendants' property. But in any event, the order of sequestration in this case directed the sequestrator to seize

> ". . . property of the defendants in the State of Delaware, consisting of common stock, 3% Second Cumulative Preference [sic] Stock, stock unit credits, of the Greyhound Corporation and all options and all warrants to purchase the common or preferred stock of said corporation issued to the defendants and all contractual obligations, rights, debts or credits due or accrued to or for the benefit of any of said defendants under any type of written instrument, contract or other legal instrument of any kind whatever between any of the defendants and said corporation . . . ." (A. 50)

This recital does not identify property to be seized–it is a dragnet clause, pure and simple.

(3) The court states that "the value of the property seized must be reasonably related to the amount of the claim asserted." However, there is no such requirement in the statute; [10] the court has no discretion to deny a writ on this ground (as established by the cases cited at p. 15 above); there is no procedure available under the statute by which a defendant could even raise the issue without having first made a general appearance; and nothing in the record reflects compliance with any such requirement.

(4) The court states that notice must be promptly given to a defendant after seizure, but since he has no right to a hearing on the merits of the seizure, such notice does little to protect his rights.

(5) The court states that defendant may appear to attack compliance with § 366, but this gives him the right only to raise issues concerning compliance with the technical requirements of the statute and its constitutional validity. "There is no provision for an early hearing at which the . . . [plaintiff] would be required to demonstrate at least probable cause for the garnishment" (*North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. at

10. The opinion in the *Hughes* case, cited by the court as its authority for the statement, does not support it at all, as shown when the sentence from which the court quotes is read in its entirety:

> "Furthermore, *there is no limitation contained in Title 10 Del. C. § 366 as to the seizure of a nonresident's property* in Delaware, although, of course, the property so caused to be seized *should* always bear some reasonable relationship to the amount of the claim asserted." 40 Del. Ch. at 527, 185 A. 2d at 765.

607), let alone for a hearing at which defendant can question, even preliminarily, the merits of plaintiff's claim without waiving his rights under *International Shoe* and subjecting himself to personal jurisdiction. Without such provision, the statute plainly cannot withstand scrutiny under the Fourteenth Amendment.

In *North Georgia Finishing, Inc.*, the Court struck down Georgia's garnishment statute in part because it barred challenge of the garnishment without the prior filing by the debtor of a bond. See 419 U. S. at 607 & n. 5. Indeed, Justice Powell found this the "most compelling deficiency" in that procedure. 419 U. S. at 613 (Powell, J., concurring). Delaware's sequestration statute presents the *a fortiori* case. It bars a challenge without the prior general appearance by the defendant, obviously a more risky and costly step than merely filing a bond. Moreover, it impermissibly conditions exercise of the constitutionally required right to a hearing on waiver of the constitutional right to trial in a forum with the requisite minimum contacts. *Cf. Terral v. Burke Construction Co.*, 257 U. S. 529 (1922); see *Developments in the Law State-Court Jurisdiction*, 73 Harv. L. Rev. 909, 954 (1960). Conditioning the defendants' right to a hearing on his submission to *in personam* jurisdiction against which the Constitution would otherwise protect denies the defendant "a meaningful opportunity to be heard". *Boddie v. Connecticut*, 401 U. S. 371, 379 (1971).

(6) The court states that defendant may petition for release of the property and suggests that the court, in considering such a petition, may conduct a preliminary inquiry into the merits of the claim to determine whether the property should be released. But defendant can file such a petition only if and after he has submitted to personal jurisdiction; by then, the damage has been done—

the seizure has been accomplished and the defendant has been coerced into making a general appearance in order to gain access to the court to make such a petition. The right to file such a petition so conditioned obviously does not cure the constitutional defect of the statute.[11]

(7) The court states that after the defendant has made a general appearance, no new causes of action may be added to the complaint. But again, this limitation does not diminish the concededly coercive operation of the procedure which offends due process. See *Tenney v. Jacobs*, 43 Del. Ch. 526, 528-529, 240 A. 2d 138, 139 (Sup. Ct. 1968).

(8) The court states that while the property is seized, the owner may sell it or otherwise deal with it so long as all proceeds are deposited with the sequestrator, but this provision does not lessen the deprivation and coercion inherent in the procedure. Surely seizure does not become acceptable by giving the defendant the right to substitute other property. Appellants' property here was at least as completely seized as the bank account involved in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. 601 (1975).

In sum, all the so-called safeguards listed by the Court below do nothing to eliminate the constitutional defects in the Delaware sequestration procedure. If they were all applied the most a defendant can hope for is that he will have lost only his constitutional rights under *International Shoe*. That is not due process of law.

---

11. It is clear, moreover, that the availability of a quick release provision would not in any event cure a prior unconstitutional deprivation of property rights. See *Fuentes v. Shevin*, 407 U. S. at 84-86; *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. at 601.

II. Even if the Sequestration Process Were Otherwise Constitutional, Appellants May Not Constitutionally Be Coerced to Submit to the Personal Jurisdiction of the Delaware Court in the Absence of Minimal Contacts of the Defendants With Delaware.

The procedural constitutional defect in the Delaware sequestration statute is compounded by the fact that its conceded purpose is to coerce nonresidents not otherwise subject to the jurisdiction of Delaware to submit to that jurisdiction upon threat of forfeiture of their property within the state. See A. 108-109, and *Tenney v. Jacobs,* 43 Del. Ch. 526, 528, 240 A. 2d 138, 139 (Sup. Ct. 1968). Unless a defendant whose property has been sequestered makes a general appearance, he cannot defend his right to that property; the property may be sold and the proceeds applied to satisfy plaintiff's claim without any adversary hearing whatsoever. *Sands v. Lefcourt Realty Corp.,* 35 Del. Ch. 340, 117 A. 2d 365 (Sup. Ct. 1955).

But any attempt by a state to acquire jurisdiction over nonresidents brings into play the due process limitations mandated by *International Shoe* and *Hanson v. Denckla,* 357 U. S. 235 (1958); any assertion of jurisdiction must rest upon minimum contacts between the defendant and the forum such that maintenance of the suit satisfies traditional notions of fair play and substantial justice. 326 U. S. at 316.

> "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla,* 357 U. S. 235, 253 (1958).

In this case, none of the individual defendants resides in Delaware and none has, or has been shown to have, any

contacts with Delaware satisfying the *International Shoe* and *Hanson* test. Accordingly, none would be subject to personal jurisdiction even had he been properly served under a long-arm statute.

The court below sought to brush *International Shoe* aside as inapplicable on the stated ground that

> ". . . jurisdiction under § 366 remains . . . *quasi in rem* founded on the presence of capital stock here, not on prior contact by defendant with this forum (A. 102).
>
> • • •
>
> "We hold that seizure of the Greyhound shares is not invalid because plaintiff has failed to meet the prior contacts tests of *International Shoe.*" (A. 103).

But, as this Court previously has held, the question of jurisdiction cannot be disposed of by resort to labels:

> "[T]he requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U. S. 306, 312 (1950).

Rather, this Court has required consideration of all "affiliating circumstances," whether the asserted jurisdiction purports to be *in personam* or *in rem.* See *Hanson v. Denckla,* 357 U. S. 235, 245-246 (1958). As the Third Circuit recently held in *U. S. Industries, Inc. v. Gregg,* 540 F. 2d 142, 156 (3rd Cir. 1976), *Mullane* and *Hanson* make clear that regardless of the label employed the requirements of *International Shoe* must be met.

In *U. S. Industries* the Third Circuit addressed the precise question here involved, specifically rejected the decision of the court below and held the application of the Delaware sequestration statute unconstitutional in the absence of minimum contacts. The court said:

> "We can only understand *Mullane* and *Hanson* as establishing a constitutional limit to state court jurisdiction wholly independent of the label—*in rem, quasi in rem,* or *in personam*—that may be affixed to that jurisdiction. And whether it be called affiliating circumstances or minimum contacts, we must assume that ultimately the test of *International Shoe* is determinative: That there be sufficient connection with the forum 'such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."' 326 U. S. at 316.
>
> ° ° °
>
> "Judge Gibbons' analysis [in *Jonnet v. Dollar Savings Bank*, 530 F. 2d 1123, 1130-1143 (3rd Cir. 1976) (concurring opinion)], a scholarly, carefully documented history of *quasi in rem* foreign attachment in the federal courts, develops a thesis to which we perceive no effective rebuttal. 'Although it can be argued,' he concludes, 'that the content of constitutional process due a litigant defending title to property will vary from that due a litigant defending himself from liability *in personam,* there is no reason to believe that the Supreme Court presently recognizes such a distinction . . . . In short, the same limitations of fundamental fairness apply to any exercise by the state of judicial powers, whether that exercise be denominated *in rem, quasi in rem* or *in personam.* One of those limitations . . . is the *International Shoe* rule.' *Ibid.*, at 1136-37. We agree." 540 F. 2d 154.

That analysis, compelling in the abstract, is irrefutable in the present context. The conceded purpose of the Delaware statute is to acquire *in personam,* not *quasi in rem* or *in rem* jurisdiction, and it bars any hearing on the rights of the parties to the property and precludes defendants altogether from appearing to litigate and defend a *quasi in rem* proceeding. To put it differently, Delaware's procedure offers only a choice between unilateral summary seizure and disposition of the property or *in personam* litigation, not limited to the seized property, based on the defendant's coerced general appearance.

The existence of a *quasi in rem* jurisdiction does not sanction a procedure which conditions the owner's right to defend his property on his consent to the conversion of *quasi in rem* to *in personam* jurisdiction. Cf. *Terral v. Burke Construction Co.*, 257 U. S. 529 (1922). If Delaware were to exercise legitimate *quasi in rem* jurisdiction, it would necessarily afford the owner of the property an unconditional opportunity to be heard and would limit any judgment in the proceeding to the property involved.[12] That of course, is not what it does; on the contrary, it permits the summary seizure of property under conditions which make the owner's deprivation of his property rights far more grievous than those in *Sniadach, Fuentes* and *North Georgia Finishing.* See Folk and Moyer, *Sequestra-*

12. Federal courts have long recognized this distinction between *quasi in rem* and *in personam* jurisdiction and have accordingly generally limited the power of a court to enter judgment in a *quasi in rem* proceeding to the value or the amount of the seized property. See *Minichiello v. Rosenberg,* 410 F. 2d 106, 111 (2nd Cir. 1968), *cert. denied,* 396 U. S. 844 (1969); *Farrell v. Piedmont Aviation, Inc.,* 411 F. 2d 812 (2nd Cir. 1969) *cert. denied,* 396 U. S. 840 (1969); *Podolsky v. Devinney,* 281 F. Supp. 488 (S. D. N. Y. 1968); *Dry Clime Lamp Corp. v. Edwards,* 389 F. 2d 590, 595-598 (5th Cir. 1968). See also *Simpson v. Loehmann,* 21 N. Y. 2d 305, 287 N. Y. S. 2d 633, 234 N. E. 2d 669, 671 (1967), *rearg. denied,* 21 N. Y. 2d 990, 290 N. Y. S. 2d 914, 238 N. E. 2d 319, 320 (1968).

tion in Delaware: A Constitutional Analysis, 73 Colum. L. Rev. at 789-795 (1973).

This procedure cannot in any meaningful sense be said to involve *in rem* or *quasi in rem* jurisdiction. As the Third Circuit found in *U. S. Industries:*

> "[T]he result we reach is buttressed by the operation in this case of the rule of *Sands v. Lefcourt Realty Corp., supra* [35 Del. Ch. 340, 117 A. 2d 365 (1955)]. Under the interpretation that case gave to the statutory schema, the nonresident defendant is inexorably put to a Hobson's choice: either surrender by default the entire value of the seized property or submit to *in personam* jurisdiction. Keeping in mind the admonition of *Mullane* that constitutional "standards do not depend on 'elusive and confused' state law classifications, we wonder whether this jurisdiction realistically ought to be considered as *quasi in rem.* The purpose of the Delaware procedure is to coerce the nonresident to submit to *in personam* jurisdiction. And it is difficult to conceive of a more potent jurisdiction—irrespective of its label—than the jurisdiction exercised here." 540 F. 2d at 156.

Nor can the Delaware procedure be justified on any theory that it "promotes judicial economy by concentrating the settlement of claims in one jurisdiction or action." (A. 115). This Court has consistently refused to allow constitutional rights to be sacrificed at the altar of efficiency and economy:

> "Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. *Stanley v. Illinois,* 405 U. S. 645, 656, 92 S. Ct. 1208." *Fuentes v. Shevin,* 407 U. S. at 90-91, n. 22.[13]

Thus, whatever might be said for *quasi in rem* or *in rem* jurisdiction generally, it is clear that the Delaware procedure cannot be sustained on that basis. And, whatever the label attached, Delaware courts ought not to be permitted to exercise such jurisdiction in the absence of the minimum contacts required by *International Shoe.*

Finally, it is clear that defendants here lack the contacts required for the assertion of jurisdiction. The Delaware Supreme Court acknowledged that "plaintiff has failed to meet the prior contacts tests of *International Shoe.*" (A. 103; pp. 20-21 above). Certainly the ownership of stock and analogous rights in a Delaware corporation does not supply such contacts. See *U. S. Industries, Inc. v. Gregg,* 540 F. 2d at 155. Nor does such stock ownership constitute property within Delaware. Dela-

13. Moreover, sequestration does not accomplish what the Delaware court claims, for it reaches only those defendants unlucky enough to have property in Delaware. Sequestration simply bears no rational relationship to a goal of concentrating the resolution of claims in one jurisdiction or action.

ware's purported seizure of the capital stock owned by defendants is premised entirely on a fictional situs which Delaware law assigns to stock issued by Delaware corporations (8 *Del. C.* § 168).[14] In fact, none of the certificates held by any of the defendants was physically seized. Those certificates remain in the hands of their owners and are negotiable instruments under Delaware law (6 *Del. C.* §§ 8-102, 8-105, 8-301); a good faith purchaser who acquires the certificates would acquire good title to the shares it represents (see *Haas v. Haas*, 35 Del. Ch. 392, 400, 119 A. 2d 358, 362-363 (Ch. 1955); Folk, *The Delaware General Corporation Law*, 179-180 (1972)); and, of course, the state in which the certificate is located can seize it by attachment or other appropriate process, regardless of Delaware's sequestration. The Third Circuit in *U. S. Industries* concluded that this fictional situs of stock in the state of incorporation could not support jurisdiction. As it explained, the case for this fiction is no better than the case for the fiction that personalty is located at its owner's domicile, which this Court rejected in *Hanson v. Denckla*, (see 357 U. S. at 249). See 540 F. 2d at 156. See also *Jonnet v. Dollar Savings Bank*, 530 F. 2d 1123, 1139 (3rd Cir. 1976) (Gibbons, J., concurring).[15]

14. Examination of the Commercial Codes of the various states discloses that fifty-one jurisdictions have adopted Section 8-317 of the Uniform Commercial Code which provides that no attachment of shares of stock shall be valid "until the security is actually seized by the officer making the attachment." Delaware alone has modified that section by an amendment under which "the situs of the ownership of the capital stock of all corporations existing under the laws of this State . . . shall be regarded as in this State." 8 *Del. C.* § 169.

15. The purported exercise of jurisdiction on the basis of the fictional situs of stock, where the certificates are physically located outside of the state, has never been approved by this Court under the due process clause. *Rogers v. Guaranty Trust Co.*, 288 U. S. 123 (1933) and *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1 (1900), cited by the court below (A. 116) did not involve or deal with that issue. See *U. S. Industries, Inc. v. Gregg, supra*, 540 F. 2d at 150; *Jonnet v. Dollar Savings Bank*, 530 F. 2d at 1132-1139 (Gibbons, J., concurring). See also *Western Union Co. v. Pennsylvania*, 368 U. S. 71, 75 (1961).

Nor are there other factors, not considered by the courts below, which might establish the requisite minimum contacts between the defendants and a Delaware forum. In the Delaware Supreme Court plaintiff in fact attempted to argue that defendants had sufficient contact with Delaware to satisfy the requirements of due process because of their purported relation to a Delaware corporation. This argument was both irrelevant and without merit. It was irrelevant because there has been no personal service of summons on them, and Delaware has no long-arm statute authorizing such service. It was without merit because, even if Delaware had a long-arm statute, and even if proper service had been effected, simply being a director, officer or employee of a Delaware corporation is insufficient to subject them to personal jurisdiction in Delaware. See *Weller v. Cromwell Oil Company*, 504 F. 2d 927 (6th Cir. 1974); *Wilshire Oil Company v. Riffe*, 409 F. 2d 1277, 1281 (10th Cir. 1969); *Wagman v. Astle*, 380 F. Supp. 497, 499 (S. D. N. Y. 1974); *Fashion Two Twenty, Inc. v. Steinberg*, 339 F. Supp. 836, 841 (E. D. N. Y. 1971). Moreover, several of the individual defendants are not and have never been officers, directors, or employees of a Delaware corporation, and therefore lack even that tenuous connection with the state. See p. 4 above.

CONCLUSION.

For the reasons stated, the decision of the court below should be reversed and the case remanded with direction to dismiss for lack of jurisdiction.

Respectfully submitted,

RICHARDS, LAYTON & FINGER,
4072 DuPont Building,
Wilmington, Delaware.
19801

EDMUND N. CARPENTER, II,
R. FRANKLIN BALOTTI,

McCUTCHEN, DOYLE, BROWN & ENERSEN,
Three Embarcadero Center,
San Francisco, California.
94111

JOHN R. REESE,
LYNN H. PASAHOW,

Attorneys for Appellants.

November 17, 1976

EXHIBIT A.

§ 366. *Compelling appearance of nonresident defendant.*

(a) If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such nonresident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for 3 consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

(b) The Court may make all necessary rules respecting the form of process, the manner of issuance and return thereof, the release of such property from seizure and for the sale of the property so seized, and may require the plaintiff to give approved security to abide any order of the Court respecting the property.

(c) Any transfer or assignment of the property so seized after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized and sold and such sale and confirmation shall transfer to the purchaser all the right, title and interest of the defendant in and to the property as fully as if the defendant had transferred the same to the purchaser in accordance with law. (Code 1852, § 1938; 17 Del. Laws, c. 215; Code 1915, § 3850; 34 Del. Laws, c. 216, § 2; 35 Del. Laws, c. 217; 36 Del. Laws, c. 268, § 1; Code 1935, § 4374; 10 Del. C. 1953, § 366; 50 Del. Laws, c. 379, § 1.)

FILED
DEC 17 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 75-1812

R. F. SHAFFER, et al.,

Defendants-Appellants,

vs.

ARNOLD HEITNER, as Custodian for MARK ANDREW HEITNER,

Plaintiff-Appellee.

On Appeal from the Supreme Court of the State of Delaware

APPELLEE'S ANSWERING BRIEF

MICHAEL F. MASCHIO
CAROL FAYE SIMKIN
Attorneys for Appellee

COWAN, LIEBOWITZ & LATMAN, P.C.
200 East 42nd Street
New York, New York 10017
(212) 986-6272

TWILLEY, JONES & FELICEANGELI
26 The Green
Dover, Delaware 19901

JOSHUA M. TWILLEY
Of Counsel

(10250)

LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N.J. (201) 257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

Page

Question Presented 1

Summary of Argument 2

Argument:

I. THE SEQUESTRATION IN THIS CASE DOES NOT OFFEND DUE PROCESS FOR LACK OF PRIOR NOTICE. 2

A. Obtaining Jurisdiction in a Derivative Action Over Non-resident Directors, Officers and/or Employees in a Delaware Corporation to Adjudicate Claims for Official Conduct, is an "Extraordinary" Situation. 4

B. Sufficient Safeguards Are Present. 7

II. APPELLANTS HAVE SUFFICIENT TIES WITH DELAWARE TO MAKE THE EXERCISE OF JURISDICTION FAIR. 11

A. Delaware's Interest in the Subject Proceedings.. 13

B. Ties of Appellants 14

Conclusion 16

TABLE OF CITATIONS

Cases Cited:

Broderick v. Oklahoma, 413 U.S. 601 (1973) 12

Contents

Page

Calero-Toledo v. Pearson Yacht Leasing Corp., 416 U.S. 663 (1974) 5

Fuentes v. Shevin, 407 U.S. 67 (1972) 3, 4, 5, 6, 7, 8, 9, 10

Gordon v. Michel, 297 A.2d 420 (Del. Ch. 1972) 5, 6, 10

Gulf Oil Corporation v. Gilbert, 330 U.S. 501 (1946) 13

Hamilton National Bank of Chattanooga v. Russell, 261 F. Supp. 145 (E. D. Tenn. 1966) 15

Hanson v. Denckla, 357 U.S. 235 (1957) 11

Hess v. Pawloski, 274 U.S. 352 (1927) 15

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 11, 13, 14, 15, 16

Jonnet v. Dollar Savings Bank of the City of New York, 530 F.2d 1123 (3rd Cir. 1976) 3, 7, 12, 13

Merrit-Chapman & Scott Corp. v. Wolfson, 264 A.2d 358 (Del. Sup. 1970) 15

Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) 3, 8, 14

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) 3, 7, 8, 9

Ownbey v. Morgan, 256 U.S. 94 (1921) 4, 6

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 3, 5

Sugar v. Curtis, 383 F. Supp. 643 (S.D.N.Y. 1974) 9

Contents

Page

United States v. Raines, 362 U.S. 17 (1960) 12

Wagenberg v. Charleston Wood Prods., Inc., 122 F. Supp. 745 (E.D.S.C. 1954) 14

Weil v. Beresth, 26 Conn. Sup. 428, 225 A.2d 826 (Sup. Ct. 1966) 14

Statutes Cited:

10 Del. §366 ..... 4, 6, 7, 10, 12, 14

Conn. Gen. Stat. Ann. §33-322 (Sup. 1971) 14

American Bar Assoc. Model Business Corporation Act, §§143 and 145 of the Delaware Corporate Law 15

South Carolina §12-13.7 (Sup. 1970) 14

United States Constitution Cited:

Fourteenth Amendment 1

Rule Cited:

Chancery Rule 4(db) 2, 10

Other Authorities Cited:

National Division of Wilmington Trust Co., "Why Delaware" (1973-1974) 6

Quasi in Rem Jurisdiction and Due Process Requirements, 82 Yale L.J. 1023 (1973) 5

In The

Supreme Court of the United States

October Term, 1976

No. 75-1812

R. F. SHAFFER, et al.,

Defendants-Appellants,

vs.

ARNOLD HEITNER, as Custodian for MARK ANDREW HEITNER,

Plaintiff-Appellee.

On Appeal from the Supreme Court of the State of Delaware

APPELLEE'S ANSWERING BRIEF

QUESTION PRESENTED

Does the use of the Delaware sequestration statute, invoked solely to obtain jurisdiction in this derivative action over non-resident present and former officers, directors and/or employees in a Delaware corporation, in order to adjudicate claims against them for misconduct related to the affairs of the issuing corporation, which authorizes attachment of the appellants' stock without notice or a prior hearing, but which provides adequate safeguards and for release of such stock upon appellants' general appearance, comport with the due process requirements of the Fourteenth Amendment?

SUMMARY OF ARGUMENT

The Delaware sequestration process was used here to seize the appellants' stock prior to notice or hearing. This procedure is entirely consistent with due process of law because obtaining jurisdiction over non-resident officers, directors and key employees in this derivative action qualifies as an "extraordinary situation" and is attended with sufficient safeguards to prevent abuse.

Furthermore, the overall circumstances of the case, including the nature of the appellants' ties with Delaware, Delaware's own interest in adjudicating the claims, the public policy favoring Delaware as the forum to resolve the dispute, and the relative hardship on the parties, makes the exercise of jurisdiction by Delaware fair and just and consistent with fundamental notions of fair play.

ARGUMENT

I.

THE SEQUESTRATION IN THIS CASE DOES NOT OFFEND DUE PROCESS FOR LACK OF PRIOR NOTICE.

Appellee, on behalf of Greyhound, a Delaware corporation, initiated the sequestration process in this case by filing a verified complaint, an affidavit pursuant to Chancery Rule 4(db) and a sequestration bond. Thereupon, the Greyhound stock of the non-resident appellants was seized without prior notice or hearing. The sole purpose of this seizure was to obtain jurisdiction to provide a forum in which appellee's charges could be adjudicated. Appellants' property would have been immediately released if they had made a general appearance.[1]

1. As soon as appellants appear, they may immediately petition the court for a release of their property, which will automatically be granted absent a showing by appellee of a special reason for continuation of the sequestration order.

The seizure in this case must, therefore, be distinguished at the outset as factually different from those examined in several recent decisions of this Court, to wit, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972) and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). In each of these cases, *in personam* jurisdiction over the defendant was present and the Court was empowered to adjudicate the claim and render a judgment. The attachments were, therefore, not the exclusive vehicle for obtaining relief but merely served as security to satisfy any judgment rendered.[2]

The fundamental principles enunciated in these recent decisions considering pre-hearing seizures in the debtor-creditor context, although applicable here, must be viewed against the factual differences involved in this jurisdictional context. See, *e.g., Jonnet v. Dollar Savings Bank of the City of New York*, 530 F.2d 1123, 1127 (3rd Cir. 1976). They do make clear that in certain circumstances, procedures which sanction the attachment of property without prior notice or hearing can meet the due process test. Such circumstances are those in which

> "the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." *Fuentes v. Shevin, supra*, 407 U.S. at 91.

The facts of this case substantially comply with these standards and therefore the decision below holding that appellants were not denied due process should be affirmed.

2. See Mr. Justice Powell's concurring opinion in *North Georgia Finishing, Inc. v. Di-Chem*, 419 U.S. 601, 610 (1975).

A. Obtaining Jurisdiction in a Derivative Action Over Non-resident Directors, Officers and/or Employees in a Delaware Corporation to Adjudicate Claims for Official Conduct, is an "Extraordinary" Situation.

In *Fuentes v. Shevin, supra* at 91 n. 23, this Court recently noted that the situation in *Ownbey v. Morgan,* 256 U.S. 94 (1921), a case involving the more onerous[3] predecessor to Delaware's sequestration process, was an example of an "extraordinary situation" which justified excusing notice prior to seizure:

> "The attachment [in Ownbey was] necessary to secure jurisdiction in state court — clearly a most basic and important public interest."[4]

The purpose of the statute in *Ownbey,* as with 10 Del. C. §366, was "the conversion of a proceeding *quasi in rem* into an action *in personam.*" *Ownbey* at 111. Appellants are attempting to overturn the decision below by forging an attack on *Ownbey,* although that case tested procedures extending well beyond those presented here. The current viability of *Ownbey* vis-a-vis some of the procedures involved in that case may be in doubt. However, its fundamental thrust — namely, a state's vital interest in securing jurisdiction over non-resident debtors — is very much alive. The motivation underlying *Ownbey* is therefore not at all inconsistent with the most current pronouncements of this Court which have cited *Ownbey* with approval. *Fuentes,*

3. Under that statute, subsequent to the *ex parte* seizure, the defendant was required to post bail in order to make a personal appearance.

4. The appellants have achieved no headway by asserting that reliance by the court below on this *Fuentes* footnote was misplaced because the accompanying text was ignored (Appellants' Brief, p. 11). When both the text and the footnote are read together, it is clear that in setting forth, in the text, the three conditions which must coexist for a valid seizure without notice, the Court was not inventing criteria in the abstract. Rather, the Court was depicting the conditions which were present in *Ownbey* as well as in each of the other few limited situations [where the] Court allowed such seizures. *Fuentes, supra,* 407 U.S. at 91.

supra at 91 n. 23; *Sniadach, supra* at 339. See also *Calero-Toledo v. Pearson Yacht Leasing Corp.,* 416 U.S. 663, 679, n. 13 (1974). Accordingly, no further review of *Ownbey* is called for by the facts of this case.

In view of the important governmental and public interest which exists in bringing non-resident defendants within the court's jurisdiction, the use of the Delaware statute as applied in this case qualifies as an "extraordinary situation." Moreover, the need for prompt action is inherent in the nature of the remedy itself. If notice were given prior to seizure, the appellants could transfer the property and defeat jurisdiction, *Gordon v. Michel,* 297 A.2d 420, 423 (Del. Ch. 1972).

The Delaware statute as applied in this case serves the most important additional function of resolving litigation concerning Delaware corporate law — in this case for the benefit of a Delaware corporation[5] — in the Delaware courts, which are in a "unique position to make an authoritative determination of 'housekeeping' issues and to grant complete relief." *Gordon v. Michel, supra,* 297 A.2d at 423. This case must be distinguished, therefore, from attachments which provide for "the routine acquisition of jurisdiction over non-resident defendants in purely private disputes" (Appellants' Brief, p. 13). While it has been argued that such "routine" acquisition of jurisdiction could not be what this Court contemplated as an "extraordinary situation" acquisition of jurisdiction in a derivative case should fall within that scope.[6]

5. While appellee here is an individual stockholder, he sues "for all others similarly situated" and in the right of and for the benefit of Greyhound, a Delaware corporation. This case must, therefore, be distinguished from *Fuentes,* where "no more than [a] private gain was at stake." *Cf., Fuentes v. Shevin, supra.*

6. Even commentators who have seriously questioned whether foreign attachment statutes in general meet the "extraordinary situation" test have indicated that derivative actions may be an exception. See, *e.g., Quasi in Rem Jurisdiction & Due Process Requirements,* 82 Yale L.J. 1023 (1973).

The utilization of this well-known procedure, which has been in existence for many years,[7] certainly promotes the accountability of corporate fiduciaries and thereby serves a vital state and national[8] purpose. Appellants must acknowledge that Delaware has a compelling and legitimate interest in resolving a dispute for the benefit of a nationally known corporation incorporated in its own state and actively doing business in Delaware. As recently stated in *Gordon v. Michel, supra* at 422:

> "There is, indeed, a particular valid governmental interest in compelling appearance in a derivative suit in this jurisdiction because the corporation is organized here, an action can always be brought here for its benefit and the regulation of its internal affairs is governed by Delaware Law."

Directors and officers of Delaware corporations who reside throughout the nation are, via 10 Del. C. §366, readily brought into a single forum in order to resolve disputes relating to their corporate duties. Were the sequestration process under 10 Del. C. §366 unavailable, the appellee would, in reality, be denied a reasonable vehicle of bringing its case to court. Such a result would be unfortunate in that it would only facilitate an easy escape route for corporate directors, officers and other key personnel from the rigors of corporate responsiblity, the precise charge which is being levied in this action.

7. See the opinion of the court below at A98. While custom alone is insufficient to establish that a procedure conforms with due process, it still is a factor to be considered. The Court in *Fuentes, supra*, distinguished the new statutory type of replevin being challenged from its antecedents, thus implying that the absence of such distinctions would have been a point in favor of the validity of the procedure. While the point would not be as crucial as in *Ownbey, supra*, it is not to be altogether overlooked.

8. Over one-half of the important United States corporations are incorporated in Delaware; 50% of those on the New York Stock Exchange are incorporated in Delaware; and 35% of those on the American Stock Exchange are incorporated in Delaware. National Division of the Wilmington Trust Co., "Why Delaware" (1973-74). Because such a large percentage of the corporations incorporated in the United States are incorporated in Delaware, the effectiveness of Delaware's corporate laws takes on an importance national in scope.

B. Sufficient Safeguards Are Present.

Unlike the statutes invalidated in *Fuentes v. Shevin* and *North Georgia Finishing, Inc. v. Di-Chem, supra,* where a clerk issued the orders of seizures, 10 Del. C. §366 provided significant pre-seizure and post-seizure safeguards to appellants to protect against abuse. Firstly, the writ was issued by the court.[9] Before the judge for consideration was a verified complaint, and an affidavit submitted by the appellee which contained a recitation of the claim against appellants, the fact of appellants' non-residence, the details concerning appellants' ownership of property in Delaware and the value of that property, and the source of such information. This information supplied the court with sufficient facts on which to determine whether initiation of the seizure complied with the statutory tests, and hardly left the state "in the dark," See *Fuentes, supra* at 93. As stated by Vice Chancellor Brown, at A84,

> "The attachment powers of the state are not set in motion at the whim of the litigant. They are activated only by an order of this court after it is satisfied that the plaintiff has demonstrated his right to invoke the sequestration statute so as to obtain jurisdiction over the non-resident defendant in an effort to get the merits of his case before the court."

The safeguards available did not end there and are detailed in the opinion of the court below at A109-111. There it is pointed out:

> "the sequestration procedure is at *all times* under the control of a judge; a defendant has a right to litigate compliance with the Statute and the Rules of Court without appearing generally;

9. The importance of this element was underscored by the Third Circuit in *Jonnet, supra.*

> if the Court determines that there has been a valid seizure a defendant may then elect to appear generally; if he does so appear he is entitled to release of the property unless plaintiff meets the statutory terms; and a defendant is entitled to a hearing to test the reasonableness of the value of the property seized, including to the extent pertinent, the merits of plaintiff's claim."

Appellants contend, however, that the foregoing pre-seizure controls are illusory in that the Delaware Chancery Court was required to issue the writ as a matter of right regardless of the merits of the appellee's claim (Appellants' Brief, p. 7). Appellants further contend that even if such controls are adequate, an immediate post-seizure hearing is nevertheless required. Appellee respectfully disagrees.

In re-examining, *after* its decision in *Fuentes v. Shevin*, a statute where no notice prior to seizure was provided, this Court resisted any approach which would impose inflexible requirements upon the state, stating:

> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Mitchell v. W.T. Grant Inc., supra*, 416 U.S. 600, 610.

The court below, therefore, properly found it unnecessary to "litmus test" the Delaware sequestration procedure against "every facet" of the foreign attachment cases which have been decided. Rather, the relevant inquiry should be and was whether in this case adequate safeguards attended the procedure considering the respective interests of the parties.

The instant case is distinguishable from cases such as *North Georgia Finishing, Inc. v. Di-Chem, supra*, where the Court found that procedures were required to confirm the existence of

special facts justifying the attachment.[10] Here, no such "special" facts exist because the sole relevant facts are appellants' non-residence and ownership of property in Delaware. Pre-seizure procedures to confirm any such facts are meaningless.[11]

Similarly the requirement of an immediate post-seizure hearing is altogether inapplicable where sequestration was invoked solely to accomplish the valid governmental purpose of obtaining jurisdiction over the non-resident appellants. The Court has, in the cases referred to by appellants, hand-tailored the requirement of an immediate post-seizure hearing to prevent an "initial error," *North Georgia Finishing Inc. v. Di-Chem, supra* at 608, in prematurely depriving a debtor (who is already within the court's jurisdiction) of its property during the pendency of an action. This initial error could result, for example, from a weak claim by a creditor that his debtor is about to consume the property[12] or that the debtor is about to abscond or otherwise frustrate the creditor's ultimate judgment.[13]

When attachment is continued throughout the pendency of an action, the normal litigating posture of the parties, which dictates that a plaintiff cannot obtain ultimate relief until a judgment is obtained in its favor, is reversed. Therefore, if a plaintiff wishes to get such relief before the judgment, it is

10. The seizure here works far less hardship on the appellants. The seizure does not transfer the appellants' property to the appellee, but rather immobilizes the property until they appear when it will be released.

11. The Court has indicated, in *Fuentes, supra*, that any requirement that the plaintiff must put forth *ex parte* evidence in addition to the allegations in the complaint would provide only "illusory" protection to a defendant in that such evidence would not be subject to dispute by the defendant.

12. Where plaintiff's allegations of fraud are merely on information and belief, *e. g.*, see, *Sugar v. Curtis*, 383 F. Supp. 643 (S.D.N.Y. 1974).

13. Indeed, in *North Georgia Finishing Inc. v. Di-Chem, supra*, Justice Powell indicates in his concurring opinion, at 610, n.1, that the majority in that case (and perhaps in all related cases) was not directing its attention to sequestration which is designed to serve a jurisdictional function and thus, was not passing on the required controls in such a case.

understandable that it be required to come into court right after the seizure to demonstrate a credible basis for such an unusual taking. However, in the case at bar, appellee does not wish to continue to deprive appellants of their property.[14] On the contrary, as soon as they appear, their property will be released. Accordingly, while a post-seizure hearing might be required in order to afford a defendant an opportunity to obtain a release of his property prior to a resolution of the underlying controversy, it is not required where the release is obtainable merely through an appearance.

Again, the sole reason for implementation of Delaware's sequestration statute here is to obtain jurisdiction over non-resident defendants and therefore, its usage "is not dependent upon the merits of the complaint as was true in *Fuentes, supra,* and *Mitchell, supra* (Opinion of Vice Chancellor Brown, A31). The only possible "initial error," therefore, is that plaintiff is incorrect in asserting that appellants are non-residents and that they own property within the state. But, as stated by Vice Chancellor Brown in the opinion below:

> "This determination is not left to the plaintiff. On the contrary, Rule 4(db) of this Court augments §366 by providing that '[no] order shall be entered under *10 Del. C.* §366 unless the non-residency of the defendant appears in the complaint and unless the complaint is accompanied by the affidavit of the plaintiff' or other credible person' showing each defendant's last known address and also describing the property sought to be sequestered, giving its estimated value, identifying the nature of the defendant's title or interest, and disclosing the source of the affiants information — Thus both

14. Even while the property is subject to seizure, the appellants may substitute other property.

> our Court rule and practice do provide for advance judicial review to determine that there is a factual basis for the service of process in this manner."

II.

APPELLANTS HAVE SUFFICIENT TIES WITH DELAWARE TO MAKE THE EXERCISE OF JURISDICTION FAIR.

This is a stockholders' derivative action brought against some twenty-eight individual defendants (appellants), most of whom are present or former directors, officers or key employees of The Greyhound Corporation.[15] Appellee seeks to recover damages occasioned by appellants' willful violation of an order of the United States District Court for the District of Illinois resulting in the imposition of sanctions for criminal and civil contempt of court and the levy of $600,000 in fines upon the corporation as well as conduct by appellants which caused Greyhound to be found in violation of the antitrust laws. Appellee further attacks the distribution of benefits improperly received by the appellants under Greyhound's deferred compensation and stock option plans.

Appellants maintain that any attempt to acquire jurisdiction over them as non-residents brings into play the due process limitations mandated by *International Shoe Co. v. Washington,* 326 U.S. 310 (1945) and *Hanson v. Denckla,* 357 U.S. 235 (1957) and that these decisions define limitations on judicial power even when the state purports to act upon property rather than persons.

15. All but five of the appellants are present or former directors, officers and/or employees of the Greyhound Corporation, a Delaware corporation. The remaining appellants are officers of Greyhound Lines, Inc. (subsidiary) or operating divisions of the Greyhound Corporation.

The court below addressed this precise question and rejected the appellants' contention that such limitations be read into 10 Del. C. §366. The court stated:

> ". . . that jurisdiction under §366 remains, as it was in 1963, *quasi in rem* founded on the presence of capital stock here, not on prior contact by defendants with this forum. Under 8 Del. C. §163 [footnote omitted] the 'situs of the ownership of the capital stock of all corporations existing under the laws of this state — [is] in this state,' and that provides the initial basis for jurisdiction. Delaware may constitutionally establish situs of such shares here, *Rogers v. Guaranty Trust Co. of New York,* 288 U.S. 123, 53 S. Ct. 295 (1932); *Jellenik v. Huron Copper Min. Co.,* 177 U.S. 1, 20 S. Ct. 559 (1900), it has done so and the presence hereof provides the foundation for §366 in this case. cf. *Breech v. Hughes Tool Company, supra.*"

Quite aside from the question of whether such limitations are applicable to a case involving a levy on property within the state[16] the relationship of these appellants with the State of Delaware brings them well within those limitations. While the Delaware statute as written may be applied to other situations where no such ties exist, appellants, who do have a sufficient relationship, lack standing to contest constitutionally on those grounds. *United States v. Raines,* 362 U.S. 17 (1960),[17] *Broadrick v. Oklahoma,* 413 U.S. 601 (1973).

16. As noted by Circuit Judge Gibbons in his concurring opinion in *Jonnett v. Dollar Savings Bank of City of New York,* 530 2d 1123, 1136 (3d Cir. 1976) it can be argued that due process due a litigant defending title to property will vary from that due other litigants.

17. There, the Court stated ". . . one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."

In *Jonnett v. Dollar Savings Bank of City of New York,* 530 F.2d 1123 (3d Cir. 1976), Judge Gibbons, in his concurring opinion, had occasion to re-examine the scope of *International Shoe v. Washington, supra,* in light of foreign attachment. He there noted that *International Shoe* posited twin limitations upon the scope of state judicial power:

(1) "A State must have some palpable interest — rationally connected with public policy — in adjudicating a dispute within its borders for jurisdiction to be lawfully acquired."

(2) The parties and burdens associated with litigating in a particular forum should not result in a fundamentally unfair exercise of judicial power.

Contrary to the seizure involved pursuant to the Pennsylvania foreign attachment procedures in *Jonnett, supra,* the exercise of jurisdiction in the case at bar satisfies these two limitations.

A. Delaware's Interest In The Subject Proceedings.

The Greyhound Corporation is a creature of the State of Delaware. Its purposes are sanctioned by that state. It derives its powers from the laws of Delaware. The appellants' authority and powers are regulated and defined by its laws. As has been discussed in detail at pages 5-6 of this brief, Delaware has a vital state interest in calling into account the officers, directors and key employees of a corporation incorporated in Delaware for breach of the duties imposed by its law. No more logical forum exists for resolution of the issues posed by this lawsuit. The strong policy reasons in favor of centering corporate derivative litigation in the home state have in fact, been acknowledged by this Court. *Gulf Oil Corporation v. Gilbert,* 330 U.S. 501 (1946).

Indeed other states, in recognition of the strong state interest in resolving derivative litigation at home, have recently enacted statutes subjecting non-resident directors to suit in the

state of incorporation. See, *e.g.*, Conn. Gen. Stat. Ann. §33-322 (Supp. 1971); S.C. Code §12-13.7 (Supp. 1970). The validity of these statutes has been upheld. *Weil v. Beresth*, 26 Conn. Sup. 428, 225 A.2d 826 (Super. Ct. 1966); *Wagenberg v. Charleston Wood Prods.*, 122 F. Supp. 745 (E.D. S.C. 1954). That Delaware has chosen 10 Del. C. §366, rather than the enactment of a "long arm" statute,[18] to bring appellants before the court is wholly within its province. Any other result would elevate form over substance, which this Court has recently refused to do:

> "The requirements of due process of law 'are not technical, nor is any particular form of procedure necessary.' *Inland Empire Counsel v. Millis*, 325 U.S. 697, 710 (1945), due process of law guarantees 'no particular form of procedure; it protects substantial rights. *NLRB v. Mackay Co.*, 304 U.S. 333, 351 (1938).'" *Mitchell v. W.T. Grant Inc., supra*, 416 U.S. 600, 610.

B. Ties of Appellants

Appellants here, all present or former officers, directors and/or key employees in a Delaware corporation, have a direct and substantial nexus with the State of Delaware. As with Greyhound Corporation, these appellants enjoyed and continue to enjoy benefits, powers and authority which they derive exclusively from the sovereignty of the State of Delaware. The strong and continuing nature of this tie is sufficient to satisfy the due process standards enunciated in *International Shoe, supra,* for the test of the required contact is qualitative, not

18. Appellants contend that even if they had the requisite contacts with Delaware, they would still be immune from jurisdiction because they were not served personally. Delaware's sequestration process requires that non-resident defendants whose property is seized be promptly notified thereof (A110) and the sequestration order in this case provided for service by mail on each of the appellants of the order, the summons and the complaint. This procedure here resulted in actual notice and was reasonably calculated to achieve that result. Such a procedure is adequate. *Cf., International Shoe Company v. Washington, supra* at 160. Further, the absence of a state long arm statute does not make the jurisdictional reach of *International Shoe* unavailable.

quantitative. *Hamilton National Bank of Chattanooga v. Russell*, 261 F. Supp. 145 (E.D. Tenn. 1966). Thus,

> "Whether due process is satisfied must depend . . .upon the. . .nature of the activity in relation to the fair and orderly administration of the Laws which it was the purpose of due process clause to insure." *International Shoe, supra,* at 319.

Moreover, strong policy reasons have justified the exercise of jurisdiction even when merely a passing contact was involved. See *e.g., Hess v. Pawloski*, 274 U.S. 352 (1927); *International Shoe, supra* at 159.

Moreover, the provisions of the Delaware Corporate Law relating to benefits of officers, directors, and key employees are perhaps the most advanced provisions of their kind. Patterned on the recommendation of the American Bar Association's Model Business Corporation Act, §145 of the Delaware Corporate Law is virtually verbatim to Section 5 of the Model Act, and offers generous indemnification protection to appellants. Delaware enacted this statute to induce capable and responsible businessmen to accept positions in corporate management. *Merrit-Chapman & Scott Corp. v. Wolfson*, 264 A.2d 358 (Del. Sup. 1970). In addition, §143 provides for interest free loans to directors, officers and employees under certain circumstances.

Certainly the foregoing benefits were in the minds of the individual appellants when they accepted the powers, and authorities of officers, directors and employees of a Delaware corporation. Each of the individual appellants has undertaken a corresponding duty to the shareholders to adhere to the standards imposed by Delaware. To require these individuals to respond in and to the State of Delaware is only fair and just and

highly consistent with "traditional notions of fair play and substantial justice." *International Shoe, supra,* 326 U.S. 310.[19]

CONCLUSION

For all the foregoing reasons, appellee contends that in deciding this case the Delaware Supreme Court has followed guidelines recently set by this Court and has, in addition, applied those guidelines with a sense of proportion to balance the particular type of competing interests involved in a case such as this. Therefore, appellee respectfully prays that the decision below be affirmed.

Respectfully submitted,

s/ Michael F. Maschio
s/ Carol Faye Simkin
Attorneys for Appellee

COWAN, LIEBOWITZ & LATMAN, P.C.
200 East 42nd Street
New York, New York 10017

TWILLEY, JONES & FELICEANGELI
26 The Green
Dover, Delaware 19901

JOSHUA M. TWILLEY,
Of Counsel

19. The cases cited by appellants at p. 27 of their brief are inapposite. They hold that where an officer acts as an agent for the corporation in a state where the corporation is doing business, he is not subject to *in personum* jurisdiction. Here, appellee contends he should be subject to *in personum* jurisdiction in the state of the incorporation, having no regard to whether the corporation is doing business there.

FOR ARGUMENT

SUPREME COURT, U. S.
FILED
FEB 15 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

No. 75-1812.

R. F. SHAFFER, et al.,

Appellants,

v.

ARNOLD HEITNER, as Custodian for MARK ANDREW HEITNER,

Appellee.

On Appeal From the Supreme Court of the State of Delaware.

APPELLANTS' REPLY BRIEF ON THE MERITS.

RICHARDS, LAYTON & FINGER,
4072 DuPont Building,
Wilmington, Delaware. 19801

EDMUND N. CARPENTER, II,
R. FRANKLIN BALOTTI,

McCUTCHEN, DOYLE, BROWN & ENERSEN,
Three Embarcadero Center,
San Francisco, California. 94111

JOHN R. REESE,
LYNN H. PASAHOW,

Attorneys for Appellants.

International Printing Co., 711 So. 60th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX TO BRIEF.

	Page
INTRODUCTION	1
ARGUMENT	1
I. THE SEQUESTRATION PROCEDURE HAS TAKEN APPELLANTS' PROPERTY WITHOUT DUE PROCESS OF LAW	1
A. The Seizure of Appellants' Property Was Not Necessary to Serve Any Important Public Interest	3
B. No Showing of a Need for Prompt Action Was Either Made or Required	5
C. There Are No Safeguards	6
II. THE SEQUESTRATION PROCEDURE CANNOT BE USED TO COERCE A GENERAL APPEARANCE	8
III. THE SEQUESTRATION PROCEDURE IS NOT A VALID EXERCISE OF QUASI IN REM JURISDICTION	12
CONCLUSION	13

TABLE OF CITATIONS.

Cases: Page

Fuentes v. Shevin, 407 U. S. 67 (1972) 1, 2, 3, 5, 6, 7, 9
Hanson v. Denckla, 357 U. S. 235 (1958) 9, 11
Hess v. Pawloski, 274 U. S. 352 (1927) 12
Jonnet v. Dollar Sav. Bank of City of New York, 530 F. 2d 1123 (3rd Cir. 1976) 11
Koster v. Lumbermens Mutual Casualty Co., 330 U. S. 518 (1946) 11
Lindsey v. Normet, 405 U. S. 56 (1972) 9
North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U. S. 601 (1975) 2, 5, 6, 7
Ownbey v. Morgan, 256 U. S. 94 (1921) 3, 4
Sniadach v. Family Finance Corp., 395 U. S. 337 (1969) 2
U. S. Industries, Inc. v. Gregg, 540 F. 2d 142 (3rd Cir. 1976), petition for cert. filed 45 U. S. L. W. 3178 (Sep. 8, 1976) (No. 76-359) 4, 8

Miscellaneous:

Quasi in Rem Jurisdiction and Due Process Requirements, 82 Yale L. J. 1023, 1031-1032 (1973) 4

INTRODUCTION.

Appellants own stock in a Delaware corporation. Although it lacks jurisdiction over either appellants or their stock certificates, the State of Delaware has sequestered the stock and has deprived appellants of it for two and one-half years. It has done that without any pre-seizure notice and without any hearing or consideration, either before or after the seizure, of the merit of the alleged claims against appellants. Delaware's conceded purpose is to use this leverage to coerce appellants to submit to personal jurisdiction in Delaware. Unless appellants submit to Delaware's potent pressures, their property could be sold to satisfy plaintiff's *ex parte* claim.

The Delaware sequestration procedure is plainly inconsistent with the Constitution. Appellee attempts to exempt it from established due process requirements because the taking of appellants' property is aimed, not at the property itself, but at coercing appellants to forfeit their constitutional rights and submit to personal jurisdiction in Delaware. The logic of this argument is not merely unsound, it is perverse.

ARGUMENT.

I. THE SEQUESTRATION PROCEDURE HAS TAKEN APPELLANTS' PROPERTY WITHOUT DUE PROCESS OF LAW.

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' . . . It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U. S. 67, 80 (1972) (citations omitted).

Appellee concedes that these "fundamental principles", enunciated in this Court's decisions in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. 601 (1975), *Fuentes v. Shevin*, 407 U. S. 67 (1972) and *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969), are applicable here (A. B., p. 3).[1] Appellee also concedes that Delaware has taken appellants' property without prior notice, without any evaluation of the merit of the alleged claims and without opportunity for hearing, either before *or after* the seizure (A. B., pp. 2, 9-10; see O. B., p. 7).

Appellee contends that the taking of appellants' property without prior notice or hearing did not violate those fundamental constitutional principles, arguing that the situation is "extraordinary" and that there are sufficient other safeguards to satisfy due process (A. B., p. 3). Appellants agree that there are extraordinary situations that "justify *postponing* notice and opportunity for a hearing . . . . These situations, however, must be truly unusual."[2] *Fuentes v. Shevin*, 407 U. S. 67, 90 (1972). See also *Bodie v. Connecticut*, 401 U. S. 371 (1971). All parties agree that such situations must meet the following test:

> "First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." *Fuentes v. Shevin*, 407 U. S. at 91. See A. B., p. 3.

1. Appellee's Answering Brief will be cited herein as "A. B." Appellants' Opening Brief on the Merits will be cited as "O. B."

2. All emphasis herein is added unless otherwise stated.

As explained below, the Delaware statute does not satisfy any of these criteria (pp. 3-8 below). Even if it did, the statute is still unconstitutional because, as appellee concedes, Delaware's procedure does not "*postpon[e]* notice and opportunity for hearing." It *denies* it altogether (O. B., pp. 17-18; A. B., p. 10). The denial of even a postponed hearing on the merits of the alleged claim or the justification for resort to such harsh procedures deprives the statute of any possible claim to constitutionality.

A. The Seizure of Appellants' Property Was Not Necessary to Serve Any Important Public Interest.

The seizure of appellant's property plainly was not "directly necessary to secure an important governmental or general public interest" of the kind referred to in *Fuentes*, 407 U. S. 91-92. See O. B., pp. 8-13. Obtaining jurisdiction in a dispute between private parties does not remotely approach such urgent governmental interests as collecting taxes, meeting the needs of a national war effort, protecting against the economic disaster of a bank failure or protecting the public from misbranded drugs and contaminated food. The Court expressly distinguished these situations from cases, such as this, where "no more than private gain is directly at stake." See 407 U. S. at 91-93.[3]

But whatever the importance of the State's interest in securing jurisdiction, since the development of long-arm jurisdiction, it clearly is no longer "necessary" to seize property in order to serve that interest (See O. B., pp. 13-14). Thus, this Court's citations of *Ownbey v. Morgan*, 256 U. S. 94 (1921) as an historical example of a permis-

3. Appellee's suggestion that this is not such a case because it purports to be brought on behalf of the corporation and of other stockholders similarly situated (A. B., p. 5) must be dismissed as disingenuous. This is still merely a commercial suit designed to "recover" money.

sible pre-hearing seizure must surely have reference to *Ownbey's* context, which antedated the announcement of modern constitutional principles of personal jurisdiction and procedural due process. Those citations most certainly do not mean that attachment of property is still "necessary" to secure jurisdiction or that attachments designed to secure jurisdiction are free of due process limitations. See, *U. S. Industries, Inc. v. Gregg,* 540 F. 2d 142, 151-153 (3rd Cir. 1976); Note, *Quasi in Rem Jurisdiction and Due Process Requirements,* 82 Yale L. J. 1023, 1031-1032 (1973).

Appellee claims that even if the routine acquisition of jurisdiction over non-residents does not constitute an extraordinary situation, it does become extraordinary if the case happens to be a derivative suit involving issues of Delaware corporate law (A. B., p. 5). Appellee offers no explanation of why that should be so and no reason appears. It could fairly be said that every case potentially involves the interpretation or implementation of some state law, and corporate law has no claim to unique importance.

Appellee's alternative suggestion that sequestration enables Delaware to call corporate fiduciaries to account and to grant complete relief (A. B., pp. 5-6) is also wrong. Delaware does not require officers or directors of Delaware corporations to own stock or other property in Delaware, and sequestration is not effective to reach anyone who does not own such property or who owns stock held in a street name. In this case several of the defendants named in the complaint have been unaffected by the sequestration order; they are not before the court in any way (Compare, A., p. 4 with A., p. 37). Thus, sequestration, far from bringing all the parties before the Court so complete relief can be granted, discriminates among defendants on an

irrational basis. It forces the entire burden and risk of litigation upon those corporate fiduciaries who have a financial interest in their company.[4]

B. No Showing of a Need for Prompt Action Was Either Made or Required.

With respect to the second *Fuentes* criterion for determining extraordinary situations, appellee says only that "the need for prompt action is inherent in the nature of the remedy itself. If notice were given prior to the seizure, the appellants could transfer the property and defeat jurisdiction" (A. B., p. 5).

If that kind of unsubstantiated fear were sufficient, any attachment would be justified.[5] Surely this Court had in mind a less hypothetical need for prompt action. Indeed, in *North Georgia Finishing* the statute required, and plaintiff filed, an affidavit stating that there was reason to apprehend the loss of the claim unless the garnishment was issued. 419 U. S. at 602-604. Nevertheless, the Court found a conclusory affidavit to be insufficient. See 419 U. S. 607. See also, 419 U. S. at 612 (Powell, J., concurring). Here, appellee made no showing at all of a need for prompt action and the Delaware sequestration statute

4. If Delaware truly had such a strong interest in calling officers and directors of Delaware corporations to account in Delaware it could easily implement it by enacting a statute requiring actual consent to jurisdiction as a condition to holding positions with Delaware corporations. As appellee notes, some other states have enacted consent statutes, but far from supporting his position, that only casts doubt on the strength of Delaware's interest and the validity of its procedures (A. B., pp. 13-14; see also pp. 13-14 below).

5. Appellee in effect is arguing that since there is no constitutional procedure or basis for obtaining jurisdiction he is entitled to act quickly and without prior notice to make the unconstitutional procedure effective. That stands the due process clause on its head.

is not "narrowly drawn to meet any such unusual condition." *Fuentes v. Shevin,* 407 U. S. at 93.

C. There Are No Safeguards.

Appellants' opening brief demonstrated in detail that, even if this case presented an extraordinary situation, the Delaware sequestration procedure affords no meaningful safeguards that would satisfy the requirements of due process (O. B., pp. 14-19). Appellee has not dealt with that demonstration at all, but only attempts to excuse the lack of the most obviously required safeguards. His failure to meet the issue is hardly surprising for it is clear that the Delaware statute is *not* narrowly drawn and it does not permit, let alone require, anyone to determine that the seizure was "necessary and justified in the particular instance." *Fuentes v. Shevin,* 407 U. S. at 91.

Appellee seeks to distinguish the Delaware seizure statute from those struck down in *North Georgia Finishing* and *Fuentes* because the sequestration order is issued by a judge upon a verified complaint and affidavit (A. B., p. 7).[6] But the use of a judge rather than a clerk provides no meaningful control over the seizure process. Appellee's own brief makes the point eloquently: Sequestration "is not dependent upon the merits of the complaint . . ." (A. B., p. 10). "[T]he sole relevant facts are appellants' non-residence and ownership of property in Delaware. Pre-seizure procedures to confirm any such facts are meaningless." (A. B., p. 9). They certainly are. The *ex parte* pre-seizure proceeding is a rote drill, a purely ministerial,

6. Appellee's suggestion that the complaint must be verified (A. B., pp. 2, 7) is simply erroneous. The statute contains no such requirement and there is no other provision which would ensure that the plaintiff set forth the merits of his claim under oath. Cf., *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U. S. 601, 607 (1975).

non-discretionary act, and neither of the only two relevant facts has anything to do with whether plaintiff has a valid claim or with fairness to the defendant whose property is seized (See O. B., pp. 14-16). Under those conditions, what safeguard is it that the title of the person signing the seizure order is "judge" rather than "clerk"?

Appellee offers no other suggestion as to how the Delaware statute safeguards defendants against a harsh, unfair or unmeritorious seizure of property.[7] He only tries to excuse the lack of a post-seizure hearing because the purpose of the seizure is to obtain jurisdiction (A. B., pp. 9-10). But appellee never does explain how this difference in his motives can be constitutionally determinative of appellants' due process rights. To appellants the deprivation is the same: Delaware has had a stranglehold on their property for more than two and one-half years (see A., pp. 19-24), and during that entire period there has been no opportunity for hearing or examination by anyone of the validity or even the probable validity of the underlying claims. *Fuentes v. Shevin,* 407 U. S. at 97; *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U. S. at 607. And Delaware permits appellants but a single way to obtain the release of their property—by surrendering their due process rights and submitting themselves and all their other property to the jurisdiction of Delaware's courts. Such a condition cannot possibly be squared with the Constitution. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U. S. at 607, 613.

Appellee's remaining argument is a patent strawman: He says that due process does not impose any "inflexible requirements." (A. B., p. 8). Of course that is correct, and

7. Appellee refers to the filing of a bond (A. B., p. 2). It is true that a bond was posted in the amount of $1,000. But that hardly provides a safeguard against the loss that appellants might suffer from the seizure of their property having a total value exceeding one million dollars (A., pp. 59-66).

appellants have never advocated that the Delaware sequestration statute comply with any "inflexible requirements." But appellants do insist that it comply with the minimum standards of fairness under the Constitution, which it clearly does not.

II. THE SEQUESTRATION PROCEDURE CANNOT BE USED TO COERCE A GENERAL APPEARANCE.

The parties agree that the principal purpose of sequestration is to force appellants to enter a general appearance and submit to unlimited *in personam* jurisdiction. Appellee claims that is his only purpose (O. B., p. 20; A. B., pp. 1, 9-10).

Appellants contend that all assertions of *in personam* jurisdiction, under any guise or label, are subject to the same due process requirements. The Court of Appeals for the Third Circuit agrees. In *U. S. Industries, Inc. v. Gregg,* 540 F. 2d 142 (3rd Cir. 1976), *petition for cert. filed* 45 U. S. L. W. 3178 (Sep. 8, 1976) (No. 76-359), it specifically rejected the decision and reasoning of the Delaware Supreme Court in this case, and held that the Delaware sequestration statute cannot be applied in the absence of the minimum contacts required by the Constitution. See 540 F. 2d 154-156; O. B., pp. 20-25.

Nowhere in his brief does appellee even acknowledge the existence of *U. S. Industries, Inc. v. Gregg, supra.* And he has no answer to this argument except to say the court below disagreed with it and found the *quasi in rem* label dispositive (A. B., p. 12). Of course it did; that is one reason why this appeal was taken. One can only conclude from appellee's brief that he now concedes the applicability of the minimum contacts requirements. Indeed, the bulk of his argument is an unsuccessful attempt to show that the requirements are satisfied (A. B., pp. 12-16).

Appellee's attempt to show that appellants have the requisite minimum contacts is both irrelevant and without merit. It is irrelevant for the reason that the Delaware Supreme Court has said so as a matter of Delaware law. That Court considered the question and squarely held that jurisdiction under the Delaware sequestration statute is not subject to *in personam* analysis, but rather is "*quasi in rem* founded on the presence of capital stock here, not on prior contact by defendants with this forum" (A., p. 102. See O. B., p. 21; A. B., p. 12). Thus, under the Delaware statute appellant's contacts are irrelevant, and they are not even afforded an opportunity to show that they lack sufficient contacts with Delaware. Therefore, to accept appellee's argument this Court would be required to reject the clear holding of the Delaware Supreme Court as to the meaning of a state statute and, in effect, to write a new statute for the Delaware legislature. Accordingly. appellee's suggestion that the Court should uphold the application of the statute to coerce appellants to submit to *in personam* jurisdiction on the theory that they in fact have sufficient contacts with Delaware is plainly wrong.[8]

Moreover, appellee is wrong in his claim that appellants have sufficient contacts with Delaware to satisfy the Constitution. The constitutional standards are not subject to serious dispute; they were well expressed in *Hanson v. Denckla,* 357 U. S. 235 (1958), the Supreme Court case

8. A conclusion that appellants do have sufficient contacts with Delaware would not save the sequestration statute because it would not cure any of the defects described in Section I, above, or the statute's failure to permit appellants any opportunity to contest the matter:

> "The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing." *Fuentes v. Shevin,* 407 U. S. at 87 (footnote omitted). See also *Lindsey v. Normet,* 405 U. S. 56, 66 (1972). ("Due process requires that there be an opportunity to present every available defense.")

most like this one. In *Hanson* this Court held that Florida could not constitutionally assert *in personam* jurisdiction over a non-resident trustee even though the settlor of the trust was domiciled in Florida, the trustee had remitted income to her there and matters of trust administration were conducted there. This Court emphasized that personal jurisdiction depends upon the acts of *defendant,* not upon those who claim some relationship with him, not upon choice of law factors and not upon convenience or the "center of gravity" of the controversy:

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." 357 U. S. at 253.
>
> . . .
>
> "It is urged that because the settlor and most of the appointees and beneficiaries were domiciled in Florida the courts of that State should be able to exercise personal jurisdiction over the nonresident trustees. This is a non sequitur. . . . *It [Florida] does not acquire that jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the trustee.* As we have indicated, they are insufficient to sustain the jurisdiction." 357 U. S. at 253 (footnotes omitted). See also 357 U. S. at 252.

In view of *Hanson,* appellee's reliance upon the asserted interest of Delaware in adjudicating questions concerning Delaware corporations clearly is misplaced. Delaware may have such an interest, but it cannot override the lack of any purposeful contacts by appellants.

Furthermore, appellee's characterization of Delaware's interest as "vital" (A. B., p. 13) is more than a slight exaggeration. As this Court has accurately observed:

> "Under modern conditions corporations often obtain their charters from states where they no more than maintain an agent to comply with local requirements, while every other activity is conducted far from the chartering state. Place of corporate domicile in such circumstances might be entitled to little consideration under the doctrine of forum non conveniens, which resists formalization and looks to the realities that make for doing justice." *Koster v. Lumbermens Mutual Casualty Co.,* 330 U. S. 518, 527-528 (1946). See also *Jonnet v. Dollar Sav. Bank of City of New York,* 530 F. 2d 1123, 1139 (3rd Cir. 1976) (concurring opinion).

This observation is particularly applicable to Delaware, the state most commonly used for formal incorporation (see A. B., p. 6, n. 8), and it carries even greater force where, as here, constitutional rights are at stake.[9]

Appellee cannot point to a single act by any appellant in Delaware. Appellee also cannot point to a single case holding that being an officer or director of a corporation without anything more is sufficient to subject one to per-

---

9. If Delaware considered its interest in officers and directors to be as strong as appellee claims, it could enact a proper consent statute (See A. B., pp. 13-14; p. 5, n. 4 above).

sonal jurisdiction in the state in which the corporation happens to be chartered.[10]

Officers and directors of Delaware corporations are not required to own shares in the company or to conduct any meetings in Delaware or even to visit Delaware for any purpose. Their positions alone simply do not justify compelling them to take on the burdens of litigation there.[11]

III. THE SEQUESTRATION PROCEDURE IS NOT A VALID EXERCISE OF QUASI IN REM JURISDICTION.

Appellants demonstrated that, even if the concededly *in personam* jurisdiction purpose of the seizure in this case could be ignored, the statute cannot be sustained as an attempt to assert *quasi in rem* jurisdiction because: (1) there is no property in Delaware on which to base such jurisdiction (O. B., pp. 25-26); and (2) Delaware affords appellants no opportunity to appear and defend their property unless they submit to unlimited personal jurisdiction (O. B., pp. 23-24). Having admitted that sequestration in Delaware is really a device for acquiring *in personam* jurisdiction, appellee completely ignores those points, and they remain unanswered. They render the Delaware sequestration statute even more offensive to due process.

---

10. Several appellants lack even that tenuous nexus with Delaware, a fact appellee occasionally recognizes (Compare, A. B., p. 11, n. 5 with A. B., pp. 14-15).

11. This case does not remotely resemble *Hess v. Pawloski*, 274 U. S. 352 (1927), on which appellee relies (A. B., p. 15). There, of course, the defendant had done a purposeful act in the State and the action arose out of that very act. Here no appellant has done anything in Delaware and the conduct involved in the alleged claim occurred thousands of miles from Delaware.

CONCLUSION.

For the reasons stated, the decision of the Delaware Supreme Court should be reversed and the case remanded with direction to dismiss for lack of jurisdiction.

Respectfully submitted,

RICHARDS, LAYTON
& FINGER,
4072 DuPont Building,
Wilmington, Delaware.
19801

EDMUND N. CARPENTER, II,
R. FRANKLIN BALOTTI,

McCUTCHEN, DOYLE,
BROWN & ENERSEN,
Three Embarcadero Center,
San Francisco, California.
94111

JOHN R. REESE,
LYNN H. PASAHOW,

Attorneys for Appellants.

February 14, 1977.